NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

Congressional Information Service, Inc.
Washington, D.C.

CONSULTANT REFORM AND DISCLOSURE ACT OF 1981

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL EXPENDITURES, RESEARCH, AND RULES

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 719

TO AMEND SECTION 3109 OF TITLE 5, UNITED STATES CODE, TO CLARIFY THE AUTHORITY FOR APPOINTMENT AND COMPENSATION OF EXPERTS AND CONSULTANTS, TO PROVIDE STATUTORY GUIDELINES CONCERNING THE AWARD OF CONTRACTS FOR THE PROCUREMENT OF CONSULTING SERVICES, MANAGEMENT AND PROFESSIONAL SERVICES, AND SPECIAL STUDIES AND ANALYSES, AND FOR OTHER PURPOSES

SEPTEMBER 18, 1981

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
86-956 O WASHINGTON: 1981

S401-16

COMMITTEE ON GOVERNMENTAL AFFAIRS

WILLIAM V. ROTH, JR., Delaware, *Chairman*

CHARLES H. PERCY, Illinois	THOMAS F. EAGLETON, Missouri
TED STEVENS, Alaska	HENRY M. JACKSON, Washington
CHARLES McC. MATHIAS, JR., Maryland	LAWTON CHILES, Florida
JOHN C. DANFORTH, Missouri	SAM NUNN, Georgia
WILLIAM S. COHEN, Maine	JOHN GLENN, Ohio
DAVID DURENBERGER, Minnesota	JIM SASSER, Tennessee
MACK MATTINGLY, Georgia	DAVID PRYOR, Arkansas
WARREN B. RUDMAN, New Hampshire	CARL LEVIN, Michigan

JOAN M. MCENTEE, *Staff Director*
IRA S. SHAPIRO, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON FEDERAL EXPENDITURES, RESEARCH, AND RULES

JOHN C. DANFORTH, Missouri, *Chairman*

CHARLES H. PERCY, Illinois	LAWTON CHILES, Florida
DAVID DURENBERGER, Minnesota	HENRY M. JACKSON, Washington

CHRISTOPHER R. BREWSTER, *Chief Counsel and Staff Director*
B. REID DETCHON, *Professional Staff Member*
PATRICIA A. OTTO, *Chief Clerk*

CONTENTS

Opening statements: Page

Senator Danforth 1
Senator Pryor 2
Senator Sasser 17

WITNESSES

FRIDAY, SEPTEMBER 18, 1981

Clifford I. Gould, Director, Federal Personnel and Compensation Division, General Accounting Office, accompanied by Kenneth Hunter, Senior Associate Director, Program Analysis Division, and Alan Stapleton, senior evaluator 12

Donald E. Sowle, Administrator for Federal Procurement Policy, Office of Management and Budget, accompanied by Fred H. Dietrich, Associate Administrator for Systems and Technology; and Lee Carlson, management analyst 21

Arch S. Ramsay, Acting Deputy Director, Office of Personnel Management, accompanied by Morton I. Horvitz, Chief, Office of Policy Analysis and Development, Staffing Services; and Thomas F. O'Connor, policy analyst, Staffing Services 30

Karen Hastie Williams, attorney, Crowell & Moring, and former Administrator of the Office of Federal Procurement Policy 35

Russell W. Richardson, chairman, Committee on Contracting Out, Arlington, Va 52

Laura Henderson, member, board of directors, National Council of Professional Services Firms, accompanied by Harvey Kushner, also member, board of directors 65

ALPHABETICAL LIST OF WITNESSES

Carlson, Lee: Testimony 21
Dietrich, Fred H.: Testimony 21
Gould, Clifford I.: Testimony 12
Henderson, Laura:
  Testimony 65
  Prepared statement 75
Horvitz, Morton I.: Testimony 30
Kushner, Harvey: Testimony 65
O' Connor, Thomas F.: Testimony 30
Ramsay, Arch S.: Testimony 30
Richardson, Russell W.:
  Testimony 52
  Prepared statement with attachment 55
Sowle, Donald E.: Testimony 21
Stapleton, Alan: Testimony 12
Williams, Karen Hastie:
  Testimony 35
  Prepared statement 42

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Articles:
  "A Word About Consultants," by Marvin Stone, from U.S. News and World Report, September 21, 1981 6
  "Why There's Waste and Abuse—True Tales of Consulting for the Feds," by Frank J. Popper, from the New York Times, June 8, 1981 7
  From the Congressional Record, March 17, 1981 9

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD—Continued

	Page
Text of S. 719	95
Letter to David A. Stockman, Director, Office of Management and Budget, from Senator Pryor, September 18, 1981	123
Response by Mr. Stockman to Senator Pryor, October 22, 1981	123
Statement of Senator Ted Stevens	124
Agency comments:	
Comptroller General of the United States	125
Consumer Product Safety Commission	131
Department of Agriculture	136
Department of Commerce	138
Department of Health and Human Services	139
Department of Justice	141
Department of State	143
Federal Communications Commission	144
International Communication Agency	149
International Trade Commission	150
Interstate Commerce Commission	151
National Aeronautics and Space Administration	154
National Science Foundation	158
Nuclear Regulatory Commission	159
Office of Management and Budget	163
Office of Personnel Management	169
Securities and Exchange Commission	172
Small Business Administration	177
Statements:	
American Consulting Engineers Council	178
American Medical Association	180
Chamber of Commerce of the United States	197

CONSULTANT REFORM AND DISCLOSURE ACT OF 1981

FRIDAY, SEPTEMBER 18, 1981

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL EXPENDITURES,
RESEARCH, AND RULES,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 3302, Dirksen Senate Office Building, Hon. John C. Danforth (chairman of the subcommittee) presiding.

Present: Senators Danforth, Sasser, and Pryor.

Staff present: Christopher R. Brewster, chief counsel and staff director; Patricia A. Otto, chief clerk; B. Reid Detchon and Roy E. Green, professional staff members, Subcommittee on Federal Expenditures, Research, and Rules; Knox Walkup, minority staff director and chief counsel; Doug McDaniel, minority counsel; Peter Fromuth, professional staff assistant, Subcommittee on Civil Service, Post Office, and General Services.

OPENING STATEMENT OF SENATOR DANFORTH

Senator DANFORTH. The subcommittee will come to order.

This morning the Subcommittee on Federal Expenditures, Research, and Rules will consider S. 719, the Consultant Reform and Disclosure Act of 1981, a bill which seeks to increase the amount of information available to the Congress and the public on the Government's use of consulting services.

Senator Pryor introduced this bill in March, and it has attracted 18 cosponsors. Similar legislation, H.R. 4089, is pending in the House.

In addition, Senator Pryor last year held several hearings on the subject of consultant services, as chairman of the Subcommittee on Civil Service and General Services. Although not a member of the Subcommittee on Federal Expenditures, Research, and Rules, he has shown a strong and longstanding interest in this area, and I am pleased that he will be participating in this hearing with us. I am sure we will benefit from his expertise as we discuss his legislation with our witnesses.

Some have alleged that the public may not always have been well served by the Government's handling of consultant services. In the past 20 years, the General Accounting Office has reported more than 30 times on the need for improved management controls on consultant contracts.

I would emphasize that, properly managed, consulting services can make a significant contribution to Government services and operations.

Consultants can and should be used to perform services which Government employees are not equipped to perform or which are specialized and infrequently needed.

However, problem areas have been suggested, and S. 719 attempts to address them; namely, whether there is need for more competition in the awarding of contracts, whether there are potential conflicts of interest, whether the consultants' role in producing what are ostensibly governmental reports should be disclosed, and whether more information should be available on how much the Government is spending on consultant services.

The purpose of this hearing is to discuss just how well S. 719 tackles these problems. We will hear from representatives of the current administration and the Carter administration, from the General Accounting Office, and from two major consultant organizations.

The administration opposes the bill as an unwarranted intrusion on its managerial prerogatives. It may be that internal management controls will be enough to take care of the problems that have existed. It may be that legislation is not needed. That question will be addressed in this hearing.

We'll follow our usual rules in the subcommittee as far as time goes. I would ask the witnesses to try to summarize their opening statements in 10 minutes or less. Prepared statements will, of course, be placed in the record in their entirety. We will try to limit each round of questioning to 5 minutes per Senator.

Senator Pryor?

OPENING STATEMENT OF SENATOR PRYOR

Senator PRYOR. Mr. Chairman, I deeply appreciate your being so kind as to hold this hearing on this legislation this morning. I know that you share my concern that at least this issue needs to be addressed and deserves congressional attention.

Mr. Chairman, I would like to say that I have a longer statement to submit for the record, but in the interest of time, I will read only a very short statement at this time.

Senator DANFORTH Your entire statement will appear in the record of this hearing.

Senator PRYOR. It was about 2 years ago that I initiated, almost by accident, an effort to develop information about our Government's use of consulting services, for the purpose of determining whether this activity was serving the taxpayers well.

What I learned was shocking. I found that despite an expenditure of over $10 million a day for consultants, the Federal Government has woefully inadequate records, cost control, and contract management.

Today we are having management functions performed by consultants. In fact, I think these activities would embarrass the typical American business person. They should alarm every taxpayer because they are seeing today that decisions made by consultants within our federal system of Government are actually decisions that should be made by elected representatives and officials and those who are employed by the Federal Government.

Mr. Chairman, this legislation does have 18 distinguished cosponsors. As is fitting for those who have signed this legislation, I think it does respond to the problems that exist in a very impressive and, I hope, responsive way.

Here are some of the major provisions. One, this legislation will clarify agency appointive authority. Two, it will require an agency to make public the procurement requests it plans to award. It will further require the agency to make the contracts, when awarded, available for public scrutiny. It will require consultants to disclose the role they have played in preparing reports under Government contracts. It will require consultants to fully disclose any and all conflicts of interest that they might have or that could result in biased advice. It would require agencies to disclose in their budgets sent to Congress the amount of funds requested for the procurement of consulting services. In certain contracts, agencies would be required to evaluate the contractor's performance. It would establish a working plan for the Federal Procurement Data Center and make it of greater value to the Congress and to the general public.

When this legislation was introduced in June of 1980, it represented what I hoped was an informed and responsible response to the problems and abuses that our investigations had uncovered. I decided at that time to elicit as many comments and criticisms as possible from both the Government and the private sector.

After 2 days of hearings conducted in August of 1980, and since that time, I have exchanged comments with various groups and individuals regarding the substance of that legislation. What is considered here today is the result of that effort.

This legislation includes several refinements to S. 2880, and numerous GAO recommendations as well. The categories of contracts addressed by the legislation are now defined in terms familiar to the agencies. There will be no misunderstandings, or there should be none. Requirements imposed by the legislation apply only to the contracts within the categories defined.

And finally, the conflict of interest provisions are introduced for a 3-year test period at certain selected agencies. Let there be no misapprehensions, Mr. Chairman, no failure to communicate, and no lack of early warning signals.

I think that we in the Congress today have to make a choice. We can heed the mandate of the American people and take action, or we can refrain from legislating and choose to leave these problems for the bureaucracy to solve. I believe that we owe it to the taxpayer to take action. I don't think we can afford to tolerate this form of waste and delay at taxpayer expense by passing the buck from our side to the bureaucracy. Nor can we afford to cut social security benefits or national defense programs simply because we could not locate in the budget the money being spent for marginal programs.

This legislation attempts—I hope, once again, in a responsible way—to introduce accountability into this system for the first time.

In conclusion, Mr. Chairman, I would like to ask that my statement be placed in the record. I would like to also ask that this legislation be considered not only in terms of how many dollars we are expending, $10 million a day, but also in regard to the types of deci-

sions that consultants are making and the types of policy that consulting contracts are implementing today in our society and in our Federal framework.

I'm alarmed at what we have seen thus far. I must say that I am alarmed at the inactivity of the Federal bureaucracy to respond to what I consider to be a critical problem.

Thank you, Mr. Chairman.

Senator DANFORTH. Senator Pryor, thank you very much. Your full statement, as I indicated, will be included in the record.

[The prepared statement and articles submitted by Senator Pryor follow:]

PREPARED STATEMENT OF SENATOR PRYOR

Mr. Chairman, let me first express my thanks to you for scheduling this hearing. I am pleased to know that you share my belief that the issue of consultant spending by the federal government deserves Congressional attention.

Over two years ago, I initiated an effort to develop information about the federal government's use of consultant services for the purpose of determining whether this activity was serving the taxpayers well. What I learned was shocking. I learned that despite an expenditure of over $10 million dollars a day, the federal government has woefully inadequate record-keeping, cost controls and contract management. We are, as a government, performing management functions in a way that would embarrass the typical American businessman or businesswoman and alarm every taxpayer.

During the course of my investigative and legislative efforts, two administrations have adopted a consistent position. They have, in several Congressional appearances, elaborately said what action they have taken, and what additional steps they will soon take. They have said, in effect, that they have solved the problem and that Congress should leave the matter to them.

I'm sorry two administrations have asked Congress to pursue a "see-no-evil, hear-no-evil and speak-no-evil" approach to a $4 billion problem. The taxpayers deserve better. I'm also sorry that two Presidents who have been elected to cut the waste and fat in government spending have become captive to the bureaucracy's insistence that guidelines and policy letters are a sufficient response to a $10 million-a-day federal spending habit.

Let's look at the record. Last year, I fought for appropriation cuts to reduce federal spending for consultants. The Carter administration opposed us but we made some cuts. This year I proposed a $500 million cut through the budget reconciliation bill. David Stockman, OMB Director, sent a letter opposing my amendment. Thanks to help from the Subcommittee Chairman, Senator Danforth, and the Committee Chairman, Senator Roth, we prevailed. I am pleased with the success, but I remain puzzled as to why I have to fight administrations whose first loyalty should be to the taxpayers.

This issue has concerned me for a long time, but it also concerns other people. For instance, Marvin Stone wrote this week in the Editorial Page of U.S. News and World Report about this problem. Frank J. Popper, a self-employed consultant, wrote in the June 8, 1981, New York Times, of these problems. I ask that those articles be placed in the record.

In an August 5, 1980 report, the Congressional Research Service noted that some people have said that:

"(T)he government is abdicating its management responsibilities and contracting is becoming a 'form of patronage' for those who compete successfully in the contract system. Assisted by the extensive use of sole-source contracting by executive agencies, many 'private enterprise' firms survive exclusively on government contracts.

"(A)dditional legislation may be needed to obtain statistical information on the overall extent of private sector employment through federal contracts and to ascertain the costs and benefits of direct versus indirect systems of government employment. Since the growth of indirect employment through contracts may be indicative of inadequacies in the federal personnel system, comparative studies of direct and indirect systems of employment might be especially useful."

At this point, it may be appropriate to consider the statement of Budget Director David Stockman to this committee at his confirmation hearing:

"So what I am suggesting is if we are really going to solve the consultant problem, I think it is blatant, you just look at the beltway, you can see the dimensions of our problem in terms of the prosperity out there. It may explain the lack of prosperity in the rest of the country, but it has to be looked at both in the aggregate and the wider context in which it has occurred; that is in terms of our overall effort to hold down federal employment."

In a comprehensive report issued June 5, 1980, the General Accounting Office found that the management of consulting services was characterized by the following problems:

Failure to maintain adequate information on the number and cost of consulting services.

Failure to obtain adequate competition in awarding procurement contracts for consulting services.

Inconsistent, improper, or excessive rates of pay for consulting services.

Use of consulting services to perform work that should be performed by regular government employees.

Possible duplication of consultant studies.

Potential conflicts of interest between consultants' advice and their outside interests.

Disproportionate number of consultant contracts awarded at the end of the fiscal year.

Other problems have also been identified during my investigation such as:

Consultant studies costing millions of dollars are a complete waste because the agencies never actually use them;

Consultant contracts are awarded to perform basic government functions, including writing federal regulations, drafting legislation, and preparing agency budgets to be sent to Congress;

Contracts often are awarded not on the basis of a firm's qualifications but rather on the contractor's friendship with agency officials.

We, in the Congress, have a choice; we can heed the mandate of the American people and take action. Or, we can refrain from legislating and choose instead to leave these problems for the bureaucracy to solve. The Administration witnesses today will ask us to do that. They ask us to be patient and wait for their guidelines and bulletins to take effect. While I respect their views, I believe the Congress owes it to the taxpayer to take action. In the choice between Congressional action or bureaucratic action and Congressional responsibility or bureaucratic responsibility, I support Congressional action and responsibility.

We are in a period of necessary economic austerity. Budgets must be cut. We can ill afford to tolerate waste and delay at taxpayer expense by passing the buck from ourselves to the bureaucracy. We can ill afford to cut social security benefits or national defense programs simply because we could not locate in the budget the money spent for purposes that might be marginal in value or in ways that are not businesslike or cost-effective.

I hope we will consider our options—whether to rely on laws enacted by Congress or to rely on bulletins and circulars admittedly without the force of law, but also without adequate personnel or authority for enforcement by a central management agency, and without a sufficient level of commitment at the agency level to implementation. I hope we will look at how previously issued guidelines are working and why management directives announced earlier have still not been issued.

The Consultant Reform and Disclosure Act of 1981 has 18 distinguished cosponsors: Senators Sasser, Eagleton, Percy, Levin, Proxmire, DeConcini, Williams, Baucus, Simpson, Burdick, Riegle, Cochran, Heflin, Moynihan, Metzenbaum, Bumpers, Johnston and Leahy. It responds to the problems that currently exist in the federal government's use of consultant and related services.

Very simply stated, this legislation will clarify agency appointive authority. It will require an agency to make public the procurement requests it plans to award, and once awarded, to make the contracts available for public scrutiny. It will require consultants to disclose the role they play in preparing reports under government contracts. The legislation will require consultants to fully disclose any conflict of interest they have that could result in biased advice. It would require agencies to disclose in their budgets sent to the Congress the amount of funds requested for the procurement of consultant services. Agencies would be required to evaluate contractor's performance in certain contracts.

The legislation will establish a working plan for the Federal Procurement Data Center to make it of greater value to the Congress and to the public.

The legislation being considered today is a further development of the concepts contained in S. 2880, the Consultant Reform Act of 1980. When that legislation was introduced in June of 1980, I believe that it represented an informed response to the problems and abuses which my investigation had uncovered. At the same time, realizing the potential impact of such legislation upon the procurement process, I decided to elicit as many comments and criticisms as possible from both the government and private sector. Two days of legislative hearings were conducted in August, 1980 and since then I have exchanged comments with various groups and individuals regarding the substance of the legislation. The legislation considered today is the result of that effort.

This bill includes several refinements to S. 2880 and numerous GAO recommendations have been adopted. The categories of contracts which the legislation addresses are now defined, and further, are defined in terms with which the agencies should be familiar. With limited exceptions, the requirements imposed are applicable to only those contracts within the categories defined. The conflict of interest provisions are introduced for a three-year test period at certain selected agencies.

In conclusion, Mr. Chairman, I would ask that my statement of introduction of the bill be placed in the record together with a summary of its major provisions.

I look forward to take testimony of our witnesses this morning.

[From U.S. News and World Report, Sept. 21, 1981]

A Word About Consultants

(By Marvin Stone)

Consultant service, a useful activity but one that can waste a pile of the taxpayers' money, is back in the spotlight. The General Accounting Office has issued two new reports on the problems and what should be done about them.

Now Senator Pryor of Arkansas, long a campaigner for adequate supervision over this type of expenditure, is zeroing in on the Defense Department. He rightly calls for hawk-eyed vigilance to see that every dollar of the newly swollen military budget buys added security for the United States. Normally, many of those dollars go to outside consultants.

Consultants, hired by federal agencies to make studies or perform services, typically may survey drug abuse, or aging, or wasteful practices, or the requirements for the first 30 days of fighting a war. They plan conferences, conduct training courses and even have been called on to buy plane tickets for bureaucrats.

Scandals over consulting projects that sound nutty or produce no results have become almost routine. The big, overall trouble is lack of control. Nobody knows how much the government spends on consultants, but the amount appears to be growing. GAO investigators guess a total of 2 billion dollars for 1979. Staff members at the Senate Committee on Governmental Affairs, whose definitions may not be quite the same, mention more than 4 billion for 1980.

Members of Congress understand very well that consultants are useful when they perform important chores the federal agencies can't do for themselves. But they voice major complaints:

Lack of sufficient supervision.

Absence of competition. Seventy-four of 111 contracts examined by GAO were "sole source"—given to a single firm without bidding.

Questionable fees. Rates are challenged by the GAO and in Congress.

Doubtful need. Subjects of study have repeatedly been called into question.

Unnecessary "contracting out." The GAO has published 12 reports in 10 years listing consultant contracts that it believes should have been carried out by government employees.

Potential duplication. Agencies have not been looking at government lists to see if the proposed work has already been done.

Hasty contracts. These have brought scandalous failures as well as suspicion that the awarding agency was simply trying to spend all its money before the end of the fiscal year.

Possible favoritism. A "revolving door" culture exists in which officials who leave government get consulting contracts from their friends still in power.

On top of all those worries, Pryor has raised an alarming question: Will consultants, rather than elected representatives or duly appointed officials, be making U.S. policy? A written rule forbids it, but can the rule be enforced?

Final responsibility for policing of contracts has rested with the Office of Management and Budget. Regulations issued in previous years, sad to relate, have not stemmed scandal and apparent wholesale waste in consultant work.

In recent weeks, President Reagan's appointees to the OMB, in an administration pledged to economy, have moved to stanch the hemorrhaging of funds. Better reporting has been decreed. Rules governing decisions whether to contract "outside" for consultant aid are being tightened. Year-end contracts will be subjected to higher-level judgment. Cost comparisons are being called for. More advertising for bids is demanded. Agencies are exhorted to inspect the lists of existing studies before considering new ones.

OMB is woefully short of enforcement powers. It has opposed new laws, on the ground that "legislation does not produce good management." But the agency is not helpless. If anybody declines to go along with the rules, a procurement policymaker assures us, "he knows OMB can zap him the next time his budget requests come around."

So it may be that OMB, teaming up with tough inspectors general in the departments, can make the new initiative work. If not, several bills are waiting in Congress to tackle the job.

[From the New York Times, June 8, 1981]

Why There's Waste and Abuse—True Tales of Consulting for the Feds

(By Frank J. Popper)

In its first hours in office, the Reagan Administration ordered Federal agencies to cut their expenditures for outside consultants by 5 percent. The order was in part a reaction to charges, many of them substantiated, of widespread waste and abuse in Federal consulting.

The basic difficulty is that the Federal consulting market contains incentives unlikely to induce good work. Most consulting firms are small, thinly capitalized, often evanescent businesses scrambling to survive in a buyer's market. In any one field, there are many consulting firms and few Federal agencies to hire them. In such a situation the firms inevitably tend to exaggerate their abilities and to promise more than they can deliver.

The agencies are poor at preventing projects from going awry. The contract officers are slow to react to draft products of projects, especially in ways that will allow timely adjustments in the consultants' work. The agencies also lack specific devices to abort projects where the consultant performs inadequately, events outrun the project, or the concept behind the project turns out to be misguided for reasons that are nobody's fault. In early 1973 I was part of a large team examining the environmental and economic impacts of second-home developments in rural areas. But by 1974 the oil embargo and the recession had nearly destroyed the market for distant leisure homes. In 1976 our study was published anyway, and almost no one noticed.

In addition, the Federal paperwork requirements compel consultants to submit frequent, lengthy, often meaningless progress and financial reports whose production and review will interfere with the real work of the projects. The paperwork also slows payments for completed work; at the moment several agencies owe me money for work I finished over three months ago—a tardiness I have rarely experienced with private clients. The slow payments sometimes force hardpressed consultants to dun agencies for payment for past work on a project in order to finance doing the rest of it—an unhappy situation that will not encourage quality work.

The Federal agencies disconcert the consulting firms, too. After a project is awarded, an agency will sometimes alter its subject so drastically as to undo the competitive bidding that was supposed to justify the award in the first place. Recently I was part of a group that received an Environmental Protection Agency contract to analyze the siting of regionally needed but locally objection-

able activities such as nuclear-waste and toxic-chemical disposal facilities. After an obscure struggle between two E.P.A. branches, the agency decided that our main assignment would be to do estimates of the future production of toxic chemicals—a very different task, for which another group might have been more qualified.

In another case a black-owned firm received a contract from the Energy Department under a program to encourage minority businesses to enter the energy field. The firm had no energy people on its staff, but its proposal stated that it would hire a former Interior Department subcabinet official to run the project and would engage several subcontractors, including myself. The Energy Department then rescinded the contract. The department, which was having a complex turf fight with the Interior Department over precisely the subjects of our study, said that the black firm lacked energy experience—which the department had known all along, to the point of agreeing to our arrangements to make up for the deficiency.

The consultants must compete ferociously. Perhaps 30 firms will write proposals to do a given project, and 29 will have to absorb the costs of writing the proposal. All the firms have to overbid on projects to cover proposals and other costs of getting business. They also have to provide for unpredictable periods when many employees have no paying work.

The turbulence of the firms' market affects their internal life. The prized employee is not the one who conceives, carries out or supervises publicly useful projects. Instead, it is the one who gets new business—work whose actual performance is often left to others. Another valued employee is the one who routinizes the work by selling what is essentially the same project to a whole series of agencies.

These deformations do not create good morale in the firms. Turnover is high. Staffers are hired and dismissed with great alacrity as projects come and go and specialties bloom and fade. Almost no one has time, inclination, or reason to acquire deep expertise in their fields. Job security is minimal; one is only as good as one's latest project. Few good livings can be made year after year in Federal consulting.

With a few exceptions such as the Department of Housing and Urban Development, Federal agencies rarely assign their best people to manage consulting contracts. The contract officers often know little about the subject matter of their projects; they tend to issue vague specifications that provoke vague or unfeasible proposals from consultants, who simply cannot tell what the contract officer has in mind.

The contract officers are also enmeshed in paper. In particular, the Federal rules for competitive bidding seem to require endless reviews, concurrences and signatures that will often delay the starting date for even a short, simple project until many months after the specifications said it would begin. When the contract finally does come through, the people in the firm best suited to perform it are often unavailable or overcommitted.

The consulting firms and Federal agencies continually surprise each other in ways that do not exactly advance the public interest. The agencies never understand that the firms value employees who get contracts more highly than those who do them. The contract officers enjoy the intensity with which firms compete, but never grasp its wasteful side.

It doesn't bother them, for instance, if the vagueness of project specifications persuades dozens of firms to submit proposals for a project for which only a few are genuinely qualified. Nor does it bother contract officers that even apparently successful projects can be wasteful. In one peculiarly ill-managed firm we spent over three months writing a proposal for a project that barely lasted six.

It does bother contract officers, however, that after the project is awarded the lucky firm almost seems to lose interest in doing it. Contract officers are often shocked that the credentialed, experienced people the proposal promised never work much on the project. The people who do show up are distinctly second-line. The real job of the first-liners is to get another project.

How can operations of the Federal consulting market be improved? Here's what I would suggest:

When in doubt, have civil servants rather than consultants do projects. This approach may be cheaper and will give the projects' results more long-run influence in the agencies.

Put financial incentives into consulting contracts that will reward rapid, high-quality consulting work and agency review and punish inadequate performance by either party.

Assign more knowledgeable contract officers to projects and tie the officers' advancement to the success of the projects they manage. Also reward them if they can minimize paperwork, move projects expeditiously, and pay consultants on time.

Be willing on occasion to limit competitive bidding. Sometimes it is clear that only a few firms are qualified to bid on a project.

Create ways to abort projects that are obviously not working out.

Consider budgeting a greater portion of agency consulting money for unsolicited proposals, ones that do not respond to agency specifications but nonetheless deal creatively with agency concerns. This policy will tap the firms' inventiveness, which is what they have to offer the Government.

[From the Congressional Record, Mar. 17, 1981]

CONSULTANT REFORM AND DISCLOSURE ACT OF 1981

Mr. PRYOR. Mr. President, for the past year and a half, I have conducted an investigation of the billions of taxpayer dollars that the Federal Government spends each year for consultant services. Estimates of the amount of Federal funds spent annually on consultant services range from a conservative $2 billion to over $9 billion. My concern began when I became aware of work contracted for which was duplicative, senseless, and overpriced. The results of my investigation have convinced me that what I originally found was not random waste—but a byproduct of a basic change in the way our Government does its work.

Today, the passage of each new law, the emergence of each new "crisis," the creation of each new program is cause for delegating the basic work of Government to an ever growing contractor work force that is increasingly planning and implementing Federal policy and programs.

As the General Accounting Office has recently summarized, the consulting problem has been with us for at least two decades, and Federal managers have done little to bring it under control. It is now apparent that the issues posed by the use of consultants are not simply management issues, but basic questions of government that command the attention of us all. These issues include the invisibility of a large and growing portion of the Federal work force, the lack of accountability of that work force, and the failure to apply to that work force even the minimal standards of ethics and disclosure that apply to officials at virtually every level of American government.

The legislation that I am introducing today will respond to the problems that currently exist in the Federal Government's use of consultant and related services. The legislation has been carefully drafted so that it will have the maximum beneficial effect on certain wasteful spending practices, while having no adverse effect on an already overburdened procurement process. Furthermore, the legislation has been designed not to add unduly to the Government's paperwork requirements.

The legislation being introduced today responds directly to the abuses, problems, and especially, to the disturbing lack of information concerning the use of consultants which my investigation has uncovered. During the course of my study, I have found that—

Consultant studies costing millions of dollars are a complete waste because the agencies never actually use them;

Conflicts of interest exist which negate the objectivity and independence which the Government thought it would obtain when awarding the contract;

Consultant contracts are awarded to perform basic governmental functions, including writing Federal regulations, drafting legislation, and preparing agency budgets to be sent to Congress;

There is an almost complete absence of competition in awarding consultant-type contracts despite estimates that competition saves 20 percent of contract price; and

Contracts often are awarded not on the basis of a firm's qualifications but rather on the contractor's friendship with agency officials.

The list goes on.

The most remarkable finding was the abysmal lack of information available concerning consulting contracts, and even procurement generally. This is true despite a Presidential mandate to all Federal agencies that they identify the total Federal expenditures for consultants. We still do not have accurate and reliable information today. It is impossible to identify these expenditures in

agency budgets, a fact which may not be particularly surprising since we have found consultants themselves are preparing many agency budgets that are submitted to the Congress.

Mr. President, when the legislation was in the early drafting stages, it was thought that the abuses could be dealt with through simple and direct prohibitions. But, as work proceeded, it became apparent that another layer of regulatory prohibitions was not the answer, at least at this time.

First, we found that, at least in some important cases, the problem is not the absence of rules, but the failure to honor them—or by the same token, the creativity employed in finding new ways to avoid them. Indeed, it became apparent that the official response to each wave of consulting scandals is the restatement of existing rules, the announcement of new rules, and the promise of better management. It is now evident that the issuance of new rules, as opposed to the enforcement of old rules, has become a powerful way of avoiding confrontation with, and control of, the real problem.

Second, it became distressingly apparent that, despite decades of management concern, we know very little about Federal use of consultants. It is difficult to contrive new regulatory schemes in the dark.

The legislation I propose therefore is a sunshine approach. It does not try to tell agencies that they must—or must not—use consultants. It says to agencies "if you use consultants, we in Congress and the public want to know about it. We want to know whom you use, what you have them do, and how you use the work they do for you." The record we have developed shows that the need for sunshine could not be more pressing.

Quite simply, we have found that the Federal Government has not only contracted out virtually every type of basic Government activity, but has done so on terms designed to insure the invisibility of this reliance.

In proposing sunshine legislation I hope to serve three basic ends—the protection of the integrity of government, the enforcement of existing rules, and the production of basic information on which to base future reform. In so doing, the public's right to know who governs it will be reaffirmed. Sunshine will be employed as a deterrence to the continuation of the abuses that characterize the present use of consultant services. The potential embarrassment of public explanation should, in itself, deter abuse. And, the disclosure required will permit us to begin to develop basic information now lacking about the consulting bureaucracy—information on which further reforms can be built.

Those who would claim that the coverage of the legislation is overbroad and that the topic is best dealt with by executive branch management would both misread the legislation and ignore the sad story of decades of management failure. The legislation, in view of the magnitude of its subject, is actually very modest. It does not impose new layers of regulations, but rather, the disclosure of ongoing activities. But to say the legislation is modest is not to suggest that it will be ineffective. Rather, it is to state that those who would propose to limit the sunshine in the legislation bear a very strong burden. They must explain to the American public why it is that the public cannot know the most basic information about a hidden work force to whom it not only pays billions of dollars, but to whom we are increasingly entrusting the basic work of Government.

Very simply stated, this legislation will clarify agency appointive authority. It will require an agency to make public the procurement requests it plans to award, and once awarded, to make the contracts available for public scrutiny. It will require consultants to disclose the role they played in preparing reports under Government contracts. The legislation will require consultants to fully disclose any conflict of interest they have that could result in biased advice. It would require agencies to disclose in their budgets sent to the Congress the amount of funds requested for the procurement of consultant services. Agencies would be required to evaluate contractor's performance in certain contracts.

The legislation will establish a working plan for the Federal Procurement Data Center to make it of greater value to the Congress and to the public.

The legislation being introduced today is a further development of the concepts contained in S. 2880, the Consultant Reform Act of 1980. When that legislation was introduced in June 1980, I believed that it represented an informed response to the problems and abuses which my investigation had uncovered. At the same time, realizing the potential impact of such legislation upon the procurement process, I decided to elicit as many comments and criticisms as possible from both the Government and private sectors. Two days of legislative hearings

were conducted in August, and since introduction of S. 2880 I have exchanged comments with various groups and individuals regarding the substance of the legislation. The legislation introduced today is the result of that effort.

This bill includes several refinements to S. 2880 and numerous GAO recommendations have been adopted. The categories of contracts which the legislation addresses are now defined, and further, are defined in terms with which the agencies should be familiar. With limited exceptions, the requirements imposed are applicable to only those contracts within the categories defined. The conflict-of-interest provisions are introduced for a 3-year test period at certain selected agencies.

Mr. President, I urge my colleagues to support this legislation which is based on the simple principle that when the Government undertakes to serve the public interest by procuring services from the private sector, this activity should be subject to congressional and taxpayer scrutiny. Unfortunately, this is not how our federal system works today.

Mr. President, I also want to say that in the legislation I am introducing today, I am proud to be joined and have as cosponsors Senators SASSER, EAGLETON, PERCY, LEVIN, PROXMIRE, DECONCINI, WILLIAMS, BAUCUS, SIMPSON, BURDICK, RIEGLE, and COCHRAN.

Mr. President, I ask unanimous consent that the legislation I am introducing today, with these distinguished cosponsors, and a summary of the major provisions of the bill be printed in the RECORD.

CONSULTANT REFORM AND DISCLOSURE ACT OF 1981

MAJOR PROVISIONS

Clarifies the authority of agencies to appoint experts and consultants pursuant to title 5, section 3109 U.S.C. Requires that OPM assume a more active oversight and reporting role in relation to the use of appointments by agencies.

Defines consulting services, management and professional services, and special studies and analyses as the universe to which most provisions apply.

Requires the publication of all consulting services, management and professional service, and special study and analysis contracts in excess of $10,000 in the Commerce Business Daily prior to award. Also requires notification and justification of all subsequent modifications which increase the contract value by $25,000 to be sent to the respective Inspector General or comparable official.

Requires basic attribution information to be included in reports prepared pursuant to a consulting service, management and professional service, or special study contract and in agency-prepared reports which include substantial portions of such contractor-prepared reports.

Requires the evaluation of consulting, management and professional service, and special study and analysis contracts which exceed a value of $50,000. Special attention is focused on performance according to the terms of the contract and deviations from cost and time as specified in the original contract.

Organizational conflict of interest determinations are required which are to be applied on a test basis—for three years—at the Departments of Energy and Transportation, and the Environmental Protection Agency. Actual conflicts and appearances of conflict are addressed in regard to consulting, management and professional service, and special study and analysis contracts only. Where an adverse determination is made the contractor will have an appeal procedure.

Line item identification in the budget submitted by the President to Congress is required for consulting service, management and professional service, and special study and analysis procurement requests. Agencies will also be required to explain these requests in the budget justification process.

The Federal Procurement Data System is codified.

Agency contract listings for all contracts entered into within the preceding 12 months, and contracts which are active, are required to be maintained and be made available to the public for inspection. Such listing will be updated quarterly.

Written justifications for consulting service, management and professional service, and special study and analysis contracts are required to be maintained by the agencies and are to be made available to the public.

All contracts, unless classified for national security purposes, are to be considered public documents and thus available for inspection by the public unless disclosure is prohibited by law.

Senator DANFORTH. The first witness is Mr. Clifford Gould, director of the Federal Personnel and Compensation Division, General Accounting Office.

Mr. Gould?

TESTIMONY OF CLIFFORD I. GOULD, DIRECTOR, FEDERAL PERSONNEL AND COMPENSATION DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY KENNETH HUNTER, SENIOR ASSOCIATE DIRECTOR, PROGRAM ANALYSIS DIVISION, AND ALAN STAPLETON, SENIOR EVALUATOR

Mr. GOULD. Thank you, Mr. Chairman.

I would like to introduce the two people at the table with me. On my left is Mr. Kenneth Hunter, senior associate director of our Program Analysis Division. On my right is Mr. Alan Stapleton, senior evaluator in the Federal Personnel and Compensation Division.

We are pleased to be here today to discuss S. 719, the proposed Consultant Reform and Disclosure Act of 1981.

This bill would, among other things, amend section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants and provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses.

The General Accounting Office's concern about the Government's use of consulting services is evidenced by over 30 audit reports we have issued on this subject during the last 20 years. These reports identified the need for almost every major Federal agency to better manage these services.

Although we continue to believe that the proper use of consulting services is a legitimate and economical way to conduct government operations, we see little evidence that agencies are acting administratively to correct abuses. Our recent report, "Government Earns Low Marks on Proper Use of Consultants," was issued in June of 1980. It concluded that many of the same problems that existed as far back as 1961 exist today.

Normally, we do not support legislative remedies for problems that could be resolved administratively. However, since executive branch agencies, with few exceptions, have not acted administratively, we believe congressional action is necessary. Accordingly, we can support S. 719 if certain suggested changes are made.

As you know, we did not support the previous version of this bill introduced in the 96th Congress, S. 2880, partly because of our concern that it could unduly constrain agencies' abilities to obtain valuable consulting expertise from the private sector.

However, the current bill has incorporated most of the suggestions made during our August 19, 1980, testimony on S. 2880 before the Senate Committee on Governmental Affairs. For the most part, S. 719 adequately balances the public's need for assurance that Federal funds for consulting services will be spent properly with the agencies' need to use these services, where appropriate, to carry out Federal programs.

My comments today are also contained in a July 22, 1981, letter from the Acting Comptroller General to the chairman of the Senate Committee on Governmental Affairs.

Section 203 would require agencies to disclose certain information on each report prepared by a contractor and on agency reports which are substantially derived from or include substantial portions of contractors' reports. We believe the information required by the bill would be useful but would suggest that another disclosure provision be added to require a brief description of the work performed by the contractor, such as data collection, data analysis, and so on. We believe this information would help show the potential for contractor personnel to influence the report's conclusions and recommendations.

Section 204 would require a written agency evaluation of consulting and professional service contracts in excess of $50.000. Our March 20, 1980, report on consulting service contracts supports the need for such evaluation. This report is titled "Controls Over Consulting Service Contracts at Federal Agencies Need Tightening." We believe it is critical for agencies to assess the quality and the use made of consulting services, including an appropriate justification for failing to use the results of these services.

We reviewed 60 completed contracts and found that one-third were of questionable or marginal value to the agencies. Previous GAO studies dating back to 1961, as well as the Commission on Government Procurement, have found that many Federal agencies do not, for various reasons, fully use reports prepared under Federal consulting service contracts.

Accordingly, we would suggest that the scope of this section be expanded to include a requirement for agencies to evaluate the actions they took in response to any consultant's report containing recommendations to agency officials. If no action was taken on the recommendations, the reasons should be stated in the evaluation.

Also, we believe the evaluations should be approved by an agency official at least two levels above that of the program manager responsible for monitoring the consultant's performance to help assure the objectivity and quality of the evaluations.

Section 205 would require, for a 3-year period after enactment, that all potential contractors with the Departments of Energy and Transportation and the Environmental Protection Agency disclose all relevant facts relating to an existing or potential organizational conflict of interest concerning proposed consulting and related service contracts. A designated office in each agency would then evaluate each statement submitted and determine whether an actual conflict or the appearance of a conflict existed and, if so, send written notification of that determination to the offeror. The offeror could then transmit additional information to the head of the agency with a request for review of the original determination.

If the original determination is not reversed by the head of the agency, three options would be available: (1) Disqualify the contractor from eligibility for award of the proposed contract; (2) award the contract with special contractual provisions to avoid conflicts; or, (3) award the contract if the needed services cannot be obtained elsewhere, but make the relevant facts and circumstances concerning the

86-956 O - 82 - 2

conflict available to the public and the congressional committee with the legislative jurisdiction over that agency.

With one exception, we support this section of the bill. It is consistent with our previous testimony that suggested the conflict-of-interest provision be tested at selected agencies for a period of time before applying it Government-wide.

The exception we are talking about concerns section 205(h) which would require GAO, in conjunction with the Director of the Office of Management and Budget, to evaluate agencies' implementation of this section and report the results to the Congress with recommendations for continuing, modifying, or terminating the provisions of the section. This evaluation would be required to begin 2 years after the bill's enactment and the report issued within 9 months later.

As a general policy, we do not support legislative requirements for GAO audits or evaluations of a particular program. Under section 312(a) of the Budget and Accounting Act of 1921, as amended, the Comptroller General has authority to investigate and report on "all matters relating to the receipt, disbursement, and application of public funds." Section 204(a) of the Legislative Reorganization Act of 1970, as amended, directs the Comptroller General to "review and evaluate the results of Government programs and activities carried on under existing law."

In our opinion, this existing legislation gives us adequate authority to make the evaluations that would be required by this bill. Furthermore, committees having jurisdiction may request our office to perform desired reviews. We believe such an arrangement, in lieu of a specific legislative requirement, would be mutually advantageous because it would permit us, through discussions with the committee, to reach agreement on the scope and timing for our initial audit efforts and thus concentrate on the matters of greatest concern to the committee. Accordingly, we recommend that the requirements for the GAO audit be deleted from the bill.

Section 206 would, among other things, require the President's budget transmitted to the Congress each fiscal year to set forth separately, within each subfunctional category, the amount of funds for (1) consulting services, management and professional services, and special studies and analyses and (2) all other procurements.

Although we support the purpose of this provision to provide the Congress with more information on indirect Federal work force costs, we would prefer an alternative to the proposed change in budget subfunction groupings. We believe this alternative will provide the Congress with more information on the indirect work force of which consulting services, management and professional services, and special studies and analyses are only a part. Other contract services include such things as janitorial and guard services.

In a March 31, 1981, letter to the chairman of the Subcommittee on Human Resources of the House Committee on Post Office and Civil Service, we stated the preferred alternative would be to revise the present object class structure to give a clearer and more detailed breakdown of Federal contract work force costs. It would be necessary to add several new object classes to replace the large vague category called "other services" which was more than $60 billion in fiscal year

1980. There will also be the need to separate the obligation amounts into those incurred between Government agencies and those involving nongovernment sources.

Current budget justification documents will need to be revised and standardized to include, by agency and by program, a more detailed presentation directed specifically at total work force costs. To accommodate these changes, it will also be necessary for the Office of Management and Budget and agencies to review their budget instructions, forms, and systems. Once these changes are in place, all branches of Government will be able to address any congressional limitations on total work force costs through language in appropriation acts. We prefer this alternative because changes to the object class structure can build a solid foundation for any subsequent changes to the subfunctional budget categories.

While this is an alternative we prefer, we also recognize there are several limitations, primarily the need for the executive branch to develop a detailed implementation plan and the length of time needed to phase in the new structure. Inasmuch as it will take several budget cycles to successfully accomplish this alternative, it must be considered a long-term effort.

Section 207 would provide in law a requirement for a Federal procurement data system to collect and disseminate information on all contracts entered into by each agency. The system would be required to classify every contract or contract modification over $10,000 as either for professional services or for commercial and industrial-type activities and include for each such contract or contract modification many different items of information. The General Services Administration currently operates a data system that provides much of the information required by this section.

We suggest two changes to this section. The first change concerns the requirement to classify each contract as either professional services or commercial and industrial-type activities. These two categories of contracts are not mutually exclusive. For example, a contract for professional services could also be considered a commercial and industrial activity in Office of Management and Budget Circular A–76. We believe more appropriate categories would be (1) contracts for goods and (2) contracts for services.

The second suggested change concerns the requirement for the system to include a brief description of the work to be performed under each contract. The current GSA data system does not have detailed descriptions of the specific product or service being purchased. Rather, the system has hundreds of standard categories of goods and services, and agencies select the one category that best describes the goods or services being purchased; that is, "cost benefit analyses" contract or "regulatory" study contract. We are not aware of any demand for more detailed descriptions and are concerned that the cost to provide this additional information on about 400,000 Federal contract actions annually may exceed the benefits. GSA could probably provide specific data on the costs and benefits to add this requirement.

Section 208 would require each agency to prepare a written justification for each consulting and related service contract awarded by the agency. Although we support the purpose of this section to strengthen

agency justifications for consulting services, the Congress recently enacted legislation, as recommended by GAO, that imposes a similar requirement.

Section 307(a) of title III, Public Law 96–304, July 8, 1980, requires agencies to include, in their annual budget justifications to the House and Senate Appropriations Committees, a separate justification for all consulting service funds requested, the appropriation accounts in which these funds are located, and a brief description of how agency programs can benefit from these services. This should provide adequate assurance that all consulting funds requested are needed to carry out Federal programs and provide the Congress with the necessary budget visibility to question the level of funds requested.

Agencies' first justifications required by this law were only recently completed as a part of the fiscal year 1982 budget process. We believe this legislation should be given a chance to work before imposing the more detailed, extensive justifications required by section 208(2) with the accompanying increase in paperwork that it would generate. Accordingly, we believe section 208(2) should be deleted.

That concludes my remarks, Mr. Chairman. I would be happy to answer any questions at this time.

Senator DANFORTH. Mr. Gould, thank you very much.

In your view, how widespread, if at all, are conflicts of interest in this whole situation?

Mr. GOULD. I'd like to ask Mr. Stapleton to address that. In a prior review, we looked at that question.

Mr. STAPLETON. Mr. Chairman, we have done some limited work in this area but not as much as needed to give you a definitive answer today. We did some work for the House Subcommittee on Oversight and Investigations where we used a definition of conflict of interest to take a look at certain contracts with various agencies. I don't have the numbers at hand, but they were relatively significant.

Senator DANFORTH. Could you give us an example, or some examples, of what sorts of conflicts of interest you have in mind? Or hypothetical?

Mr. STAPLETON. I am more familiar with the Department of Energy's example than perhaps any other agency. Say, the Department of Energy awards a contract for a particular consulting firm to evaluate the financial impact of a particular regulation, and this particular consulting firm would at the same time be working for other outside interests—whether it be oil companies or whatever—that would have a financial interest in the outcome of the consultant's study.

On the surface, it would be just an appearance of a conflict. Fortunately, the Department of Energy does have some statutes and regulations where the relevant facts surrounding the conflict would be brought forward and the Department of Energy would make a specific decision as to whether the conflict was a problem.

Senator DANFORTH. Now, with respect to publishing notice of intent to award consultant contracts, what would be the purpose of that?

Mr. GOULD. I think the purpose of that in the legislation is to assure that you get greater competition. There are a large number of contracts that are awarded on the basis of unsolicited bids to sole-source contractors, where the consultant, in effect, comes in and tells the

agency, "I can do this for you," and the agency then turns around and awards that contract to the consultant to do that work without seeing whether there are other people, other consultants in the area, who are equally or better capable to do that work.

Senator DANFORTH. Let's suppose that such a notice is published and two responses come in—one response for $20,000 and the other for $50,000. The $20,000 bid is from Ineptitude & Associates; they are incompetent. The other people are very well-respected in the field. Does that put a cloud on consulting contracts? Is the $50,000 consultant—the person you would really want to consult with—is he going to come under tremendous criticism, be attacked, given the Golden Fleece Award, and so on, for being the consultant in these circumstances?

Mr. GOULD. I do not think that competition implies that you are only talking about price. You are talking about qualified bidders and people who can do the work for you, to do the task that you have laid out. If the Incompetent Associates cannot do the task, no matter what the price is, you would not award a contract to them. You'd have to look at it.

Senator DANFORTH. In reality, though, would somebody in the Government want to protect himself from future criticism and from being exposed in the press or being exposed in the Congress by going overboard not to bring in the consultant that he would really like to have because of such a requirement, to get somebody who might be less qualified?

Mr. GOULD. Well, I think that is always a possibility, and I think that is really what we are talking about here today—the management of the consultant program. If people don't use good judgment and do the things that are proper to properly execute their jobs, yes, you are going to find people that would do that, that would look at the price and say, "I am going to be subject to criticism and, therefore, I am going to award to that low bidder."

Senator DANFORTH. Isn't that typical of government?

Mr. GOULD. I would hope it's not typical of government. I know that there are cases of it, but I would like to think that most of our managers are good managers. The constraints of time and other factors can result in that happening, but I would like to think that is the exception.

Senator DANFORTH. Senator Pryor?

Senator PRYOR. Mr. Chairman, our very distinguished colleague and good friend. Senator Sasser, has now arrived on the scene. He may have a kind word about this bill.

OPENING STATEMENT OF SENATOR SASSER

Senator SASSER. Thank you, Mr. Chairman, Senator Pryor.

First, I want to take the opportunity to commend the chairman for his interest and action on this particular issue before the subcommittee this morning. I am aware of the fine work that the chairman and his staff did on the matter of delinquent payments to Federal agencies, and I am sure we are going to see a repetition of it here.

Let me also say, and pay tribute to the person who deserves unqualified credit, Mr. Chairman, for bringing this issue to the forefront of

both public and congressional awareness, and that is our distinguished colleague from Arkansas, Senator Pryor.

As you know, Senator Pryor has worked to correct abuses in the way the Federal Government has used the services of outside consultants ever since he came to the Senate. I might say, if I might make a pun, that prior to Pryor, not enough attention was paid to this problem.

So I was proud to join in the sponsorship of S. 2880, the Consultant Reform Act of 1980. I am also proud to support the successor to S. 2880, the Consultant Reform and Disclosure Act of 1981. I think, Mr. Chairman, that this bill represents a clear and precise refinement of last year's legislation. It sets up a sensible test period for determining just what constitutes a conflict-of-interest situation between the agency and the consultants.

So I am a staunch supporter of this legislation and, again, I want to commend the chairman for his splendid work in this area and also my distinguished colleague from Arkansas, Senator Pryor.

Senator DANFORTH. Thank you, Senator.

Senator PRYOR. Mr. Gould, how long have you been associated or working with the Federal Government?

Mr. GOULD. I have 27 years with the Federal Government, all of which is with the General Accounting Office.

Senator PRYOR. All of these 27 years with the General Accounting Office?

Mr. GOULD. That's correct, sir.

Senator PRYOR. Now, have you seen any attempt—let me say, any constructive attempt—during that time, that 27 years, to curtail the use of consultants?

Mr. GOULD. I think, in all fairness, that OMB has tried to issue regulations which would help in this area. Particularly noteworthy is the circular A–120 which has been issued in the last several years. I think the current efforts that OFPP and OMB are working on are an attempt to curtail these kinds of abuses.

Senator PRYOR. Now, is that attempt working?

Mr. GOULD. Well, it has not worked in the past. There's a different administration in place. There seems to be a stronger commitment to this need to curtail consultant abuses, and everyone seems to agree that it requires good management. The difference, apparently, is how do we go about that and whether legislative action is necessary to do it.

Senator PRYOR. Is it your opinion that OMB has been effective or ineffective in implementing its own directives?

Mr. GOULD. I think that OMB lacks the authority to enforce the directives.

Senator PRYOR. Who has that authority?

Mr. GOULD. Basically, the heads of the agencies that are required to comply with those regulations. I think the most notable example of that is that circular A–120 does not apply in the Department of Defense because the Department of Defense has not yet issued implementing regulations for it.

Senator PRYOR. In other words, the Department of Defense has not complied with circular A–120, is that correct?

Mr. GOULD. That's correct.

Senator PRYOR. Now, why haven't they complied with that request from OMB?

Mr. GOULD. I'm not sure that I can answer why they have not complied. They have to prepare their own implementing regulations which they are working on and have not yet been issued.

Senator PRYOR. I believe, if I am not mistaken, that the Department of Defense has about 70 percent of all procurement dollars of the Federal Government?

Mr. GOULD. Yes, sir, 60 to 70 percent.

Senator PRYOR. Do you find that this legislation before this committee today, Mr. Gould, would create an unreasonable amount of paperwork for the agencies to comply with?

Mr. GOULD. Well, obviously, it would require some paperwork, an increase perhaps. An unreasonable increase is a subjective determination. From our perspective, we do not think that it would create an unreasonable amount of paperwork.

Senator PRYOR. So the position of GAO is that this legislation would not create an unreasonable amount of paperwork?

Mr. GOULD. That is the position of the General Accounting Office.

Senator PRYOR. One area that I am very concerned with—and I'll be honest; I don't think the legislation that I have introduced, along with 18 of my colleagues, goes far enough in this area—I don't think that we touch significantly enough in the area of unsolicited proposals. And I wonder if you would just make a general comment, Mr. Gould, about unsolicited proposals by consultants to the agencies today and what we might be able to do to bring this problem under control.

Mr. GOULD. Well, in our past reports we have commented on the fact that there are a large number of consulting service contracts that are awarded on a sole-source basis, on the basis of unsolicited proposals. It is a very large amount of the consulting work that is done.

The new regulations that OFPP is putting together will curtail the use of that and, in fact, I think, will almost deny outright any unsolicited proposals being awarded contracts.

Again, Senator, it's one of those kinds of things that I think if you are trying to do everything that needs to be done to tighten every little loophole, the legislation does not go far enough. It does give a good framework in terms of a manager using it to try to curtail these abuses. You may need additional later on.

Senator PRYOR. This may be a personal opinion I am asking for, but because of your 27 years of work and expertise in this field, let me see if I can at least gather a personal or an official opinion of the agency that you represent this morning.

Mr. GOULD. All right.

Senator PRYOR. Would you feel that consultants today are making policy for this Government?

Mr. GOULD. Well, there is a fine line as to what making policy is. Again, we have been concerned about the use of consultants in policy-making kinds of decisions where the consultants may not have actually made the final decision themselves—that was made by a Federal executive—but the options provided and the only input in some of those decisions were from a consultant, where the options were really limited to that manager as to what decision he could make.

From that standpoint, yes, I think that there is policymaking being done by consultants, either directly or indirectly.

Senator PRYOR. Thank you, Mr. Gould.

Senator DANFORTH. Senator Sasser?

Senator SASSER. Thank you, Mr. Chairman.

Mr. Gould, as you know, I've had an interest in the General Accounting Office's work to search out and report instances of waste, fraud, and mismanagement in the Federal Government for some time and, in particular, an interest in the fraud hotline which we instituted, I think now, about 2½ or perhaps 3 years ago. What I'd like to know is this. In the allegations that are cataloged and referred to by other agencies—that the General Accounting Office refers to other agencies—are there any breakdowns or delineations in those allegations to indicate which of the allegations of fraud or waste or mismanagement might involve Government consultants or Government contractors?

Mr. GOULD. Senator, I'm not sure how they are categorized by the hotline group. I certainly can find that out and provide that information to you for the record.

Senator SASSER. I think it would be very, very helpful if that sort of information could be available because I am confident that the fraud hotline group would uncover a number of instances, I think, of at least mismanagement in the area of dealing with Government consultants.

[The information follows:]

From January 1979, to August 15, 1981, GAO's Fraud Hotline referred 4,405 allegations of intentional wrongdoing to the appropriate Federal agencies for investigation. Of these total referrals, about 20.5 percent involved wrongdoing by Federal contractors or grantees. Data is not available to separate contractor referrals from grantee referrals. Neither is data available on the percent of contractor referrals, that would meet the Office of Management and Budget's definition of consulting services in Circular No. A–120.

Senator SASSER. Mr. Stapleton, can you respond to that?

Mr. STAPLETON. Senator, several months ago I had some discussions with the hotline group about their ability to categorize referrals concerning consultant abuse, and it turns out that they have had great difficulty because of the definition problem which I believe you are aware of. They found no easy way of categorizing the calls that they were receiving—for consultants; contracts, I think they may have some statistical data on. What part of that universe of contracts deals specifically with consultants—probably they do not have.

Senator SASSER. Thank you.

Mr. Chairman, I don't have any further questions at this time. Thank you.

Senator PRYOR. Mr. Gould, does the General Accounting Office support S. 719?

Mr. GOULD. We can support the bill with the modifications that we have suggested in the statement and the letter to the chairman of the committee.

Senator PRYOR. I would like to say that I would certainly be willing to consider those modifications, and I feel that some workable solution can be found. Notwithstanding those concerns that you have, we do appreciate your fine comments and your support. Thank you.

Senator DANFORTH. Thank you, Mr. Gould.

Mr. GOULD. Thank you, Mr. Chairman. It's a pleasure to be here.

Senator DANFORTH. Our second witness is Mr. Don Sowle, Administrator of the Office of Federal Procurement Policy.

Good morning, Mr. Sowle.

TESTIMONY OF DONALD E. SOWLE, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY FRED H. DIETRICH, ASSOCIATE ADMINISTRATOR FOR SYSTEMS AND TECHNOLOGY, AND LEE CARLSON, MANAGEMENT ANALYST

Mr. SOWLE. Mr. Chairman, I have two members of the Office of Federal Procurement Policy with me this morning. On my right is Mr. Fred Dietrich, who is the Associate Administrator of OFPP for the acquisition of major systems. On my left is a staff member of Mr. Dietrich's office, Ms. Lee Carlson.

My statement this morning is fairly brief and I would like, for the most part, to read the statement as I have it, if that is all right.

First of all, I would like to thank the committee for inviting me here today. I am pleased to have the opportunity to give the members the views of this administration on S. 719, the Consultant Reform and Disclosure Act of 1981.

Let me say initially that the basic philosophy of the executive branch recognizes the need for strong management controls to curtail abuses in the use of consulting services.

Our objective is to eliminate abuses—not to eliminate the appropriate use of consulting services. Accordingly, we believe that aggressive agency management and effective control and disclosure requirements will lead to lasting reforms. We are pleased to report that expenditures for consulting services contracts have declined steadily from $413 million in 1978 to $267 million in 1981. In constant 1978 dollars. this represents a decline of almost 50 percent.

Title I of S. 719 would amend section 3109 of title V concerning the general authority of Federal agencies to employ experts and consultants. Section 3109 has long been a source of confusion, and we favor legislative action to alleviate that confusion. Since the Office of Personnel Management has taken the initiative to propose legislative changes to section 3109 of title V, and is testifying today on title I of S. 719, we will restrict our comments, with your approval, to title II of S. 719.

We believe that the proper use and management of consulting services rests with the management within the executive agencies. OMB has set up adequate guidelines for establishment of these management controls, and it is the responsibility of agency management to implement these controls. Therefore, we do not favor enactment of title II of S. 719.

To a large extent, the requirements of title II are already prescribed by other statutes, regulations, and OMB directives. In our view, management of the procurement function is an inherent responsibility of the executive branch, with appropriate congressional oversight.

We believe that title II of S. 719 would impose unnecessary constraints and excessive reporting requirements on Federal agencies and

would severely hamper the effective and efficient use, management, and control of Federal consulting services. The executive branch is already taking strong measures to insure that consulting services are properly controlled. We believe that effective management is best achieved administratively rather than through legislation.

Some highlights of the significant recent actions taken by the executive branch to control consulting services are as follows:

First, on July 2, 1980, OMB directed the agencies to develop management control plans for procurement, in general, and consulting services, in particular. The agencies are now implementing these plans. It will take time to see the results. But, in the meantime, the inspectors general are evaluating and monitoring the agencies' implementations and will report to Congress and OMB on the results of their reviews.

Second, to assist the agency managers and the inspectors general in managing and controlling consulting services, the assistant secretaries for management, chaired by OMB's Associate Director for Management, are now developing a model internal control system for consulting services. The model system will be used by the agencies to evaluate and improve their own internal management control systems for consulting services. It can also be used by the inspectors general to test the operation and effectiveness of existing internal controls over consulting services. We expect the model to be published in final form by the end of October of this year.

Third, the Office of Federal Procurement Policy is also working to improve the management of consulting services. After analysis of how the agencies acquire consulting services, OFPP concluded that additional management controls over acquisition of consulting services are needed.

During this analysis, we also found that the management problems related to consulting services are also prevalent in the acquisition of similar nonconsulting services. These services involve certain management and professional services, special studies and analyses, and management support services for research and development activities.

Because of this, OMB is developing, for publication in the Federal Register, two draft directives which would call upon agencies to tighten controls in those areas we believe need management attention. Agencies and the public will be given an opportunity to comment on these drafts. Final decisions on the contents of the drafts have not been made, but I would like to outline our current thinking.

For one directive, we are considering requirements to prohibit the award of personal services contracts for consulting services; to restrict sole-source awards for consulting services resulting from unsolicited proposals; to forbid the use of consulting service contracts to perform Governmental functions which are so intimately related to the public interest as to mandate performance by Federal employees; and to require that any consulting service arrangement which exceeds 12 months be recertified as to the need for the service, including a written justification and higher level approval.

For a second directive, we are considering similar controls over selected management and professional services and special studies and analyses. Also, we anticipate adapting management controls already required by OMB Circular A–120 for this category of services.

We have, in addition, made reductions in available funding for consulting and related services for fiscal years 1981 and 1982. These reductions are reflected in the President's revised budget for 1982.

Mr. Chairman, OMB fully intends to take proper steps to insure that the Government's use of consulting services is not abused. At the same time, we believe that judicious use of consultants by Federal agencies is an appropriate and effective way to fulfill certain needs. Consultants are in wide use in the private sector and have proved their worth in furnishing fresh ideas and perspectives to in-house management. They can and should do no less for Federal agencies. We should not strip agency managers of legitimate outside advice and counsel on matters of appropriate agency concern.

In conclusion, we believe that agency management, operating within guidelines already established by OMB and those additional instructions proposed, should be given the flexibility to use consultants to meet unusual management needs.

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions you may have.

Senator DANFORTH. Let me see if I can understand your position, Mr. Sowle. You believe, as I understand it, that there is a potential for abuse in the use of consultants by the Government, is that correct?

Mr. SOWLE. There is a potential. There has been a potential. And we feel that the management controls already installed and those planned will minimize those.

Senator DANFORTH. You believe that there is a possibility of abuse and you also believe that some controls have to be in place; some structure, some way of containing the abuse has to be devised by the Government, is that right?

Mr. SOWLE. Yes, sir, that's right.

Senator DANFORTH. And your difference, your principal difference, as I understand it, with Senator Pryor and his bill is that you feel that these controls should be devised by the executive branch and not by the Congress?

Mr. SOWLE. Yes, sir, that's right.

Senator DANFORTH. Now then, are the sorts of controls that—I'm not asking you for an elaborate examination of each provision of Senator Pryor's bill—but is it your view that if you were to sit down with Senator Pryor, you would be on generally the same wavelength as to the type of controls that should be devised?

Mr. SOWLE. I think the main difference would be whether or not the controls should be frozen into a statutory requirement.

Senator DANFORTH. But I mean as far as his objectives and the types of controls and the types of abuses that he is attempting to remedy, the way he attempts to remedy it, in general terms, would you say he is correct?

Mr. SOWLE. In general terms, but we do have some problems with sections of the bill as it is now written, yes.

Senator DANFORTH. You might have some problems, but would you also have general areas of agreement?

Mr. SOWLE. I think so.

Senator DANFORTH. That is, if you could get together with him on the locus of the control, you probably could work out with him a reasonable accommodation on the types of controls?

Mr. SOWLE. I can't say that for sure because I don't know what Senator Pryor might say; but I think as far as we are concerned, we could show Senator Pryor that there are excellent controls in place now, as well as those we are planning.

Senator DANFORTH. That's a different issue. I am asking you not about the source or whether it is the executive branch or the legislative branch—not the source of control, but simply the substance of the controls. And I am asking you whether or not you believe that Senator Pryor and you are basically on the same wavelength and whether—if you were both in the executive branch and you were both in charge of working out controls—could you work together, do you think?

Mr. SOWLE. In general, yes. I think there is no disagreement, that we both want to get rid of abuses in the use of consultants, if we can.

Senator DANFORTH. I am a little bit at a loss to know why—I understand that you say that the executive branch is doing it and, therefore, Congress doesn't have to do it; but by the same token, I am not sure that I understand your argument for—what's wrong with Congress doing it? I mean, shouldn't Congress be the overseer and the rulemaker, that branch of Government which determines how the executive branch functions?

Mr. SOWLE. Yes; we don't have any difficulty with that. I think that the difficulty is that the use of consulting services is different from almost any other kind of services required, in that you can't always anticipate when and where you are going to need what kind of special help or counsel.

Senator DANFORTH. That is correct. But Congress could set out general guidelines, couldn't it, just as the executive branch could?

Mr. SOWLE. General guidelines, yes, but not real specifics such as I see in the bill.

Senator DANFORTH. Now, just one final question. Independent agencies—if limitations are placed on the process for retaining consultants by independent agencies, that would have to be done by Congress, wouldn't it?

Mr. SOWLE. I believe that's right; yes, sir.

Senator DANFORTH. So then, we would need an act of Congress if we are going to address the procedures for retaining consultants and keeping consultants at independent agencies? That could not be done by the executive branch?

Mr. SOWLE. Why don't you speak to that point, Fred? I can't speak directly to that point, Mr. Chairman.

Mr. DIETRICH. I believe it depends on how we define those independent agencies. If independent agencies are those that do not have any Federal funds appropriated for their operation, then you are right; we have no jurisdiction over them from a policy standpoint. But, as for those that receive Federal appropriations, I believe that we already have the authority to impose OMB directives on them.

There are some arguments as to how effective the circulars and directives are and how far they go, but by and large, there is compliance with the guidance that OMB provides.

Senator DANFORTH. I'm not sure. I think we might have to ask a lawyer for a legal opinion on that.

Senator Pryor?

Senator PRYOR. Thank you, Senator Danforth.

Let's take just a few points of this legislation, S. 719. The Office of Management and Budget comes before the committee on oversight—by the way, you don't blame us for seeing $10 million a day for consultants and trying to find out where that money is going and how those contracts are being awarded, do you?

Mr. SOWLE. I not only don't blame you, sir, I think you have done a tremendous job over the years in bringing this point out.

Senator PRYOR. Thank you very much.

Let's talk just a moment about the bill, just for a moment or two. You do oppose the bill, S. 719. Do you oppose requiring consultants to disclose the role that they have played in preparing reports under Government contracts?

Mr. SOWLE. We oppose displaying that information in the way the bill calls for it. We think that this information is now available.

Senator PRYOR. Now, where is that available?

Mr. SOWLE. Information as to which companies have participated in any kind of a consulting arrangement is available upon request to any Member of Congress at any time.

Now, the details that are required by the bill, such as identification of contractor and subcontractor employees, would be a rather burdensome requirement for both the agency and the contractors.

Senator PRYOR. Well, would OMB oppose agencies being required to disclose in their budgets sent to Congress the amount of funds requested for the procurement of consulting services? Do you oppose that section?

Mr. SOWLE. Well, the problem, Senator Pryor, is that the agencies can't really tell in detail what they might need consulting services for at the time the budget is prepared, which might be 1 or 1½ years before they have an actual requirement for consulting services.

Senator PRYOR. Many agencies, we've found, can't tell how many consulting services they are going to need until the end of the fiscal year or about 30 days before the fiscal year is over. And all of a sudden, they decide they need an awful lot of consulting services.

Mr. SOWLE. We think that is wrong and that is part of what we are requiring the agencies to correct through better controls.

Senator PRYOR. All right. Would you oppose, in certain contracts, a provision that agencies would be required to evaluate the performance of the contractors that had done work for the Government?

Mr. SOWLE. They are required now by OMB administrative direction to evaluate the performance of the contractors.

Senator PRYOR. Is that administrative direction being fully implemented at this time?

Mr. SOWLE. I can't tell you for sure how fully it is being implemented, but all of the agencies have implemented the instructions that OMB has put out.

Senator PRYOR. Do you oppose the section that requires consultants to fully disclose any conflict of interest that might result in biased service or advice?

Mr. SOWLE. Well, I think this is a matter, Senator Pryor, for the administration of the contract. The contracting agency should know

what the potential conflicts of interest are with any consultant that it hires.

Senator PRYOR. I'm not saying whether they should know them or not. I am saying: Is this being implemented and do you oppose this section, because I don't think it is being implemented?

Mr. SOWLE. I don't have any information that would indicate that it is not being implemented.

Senator PRYOR. Well, let me then go to a series of questions to you and also I might—I won't ask this at this time but maybe later. I will request that we have another witness come to the table at the proper time. I won't ask that because the chairman is not here now.

In your testimony, Mr. Sowle, you detailed comments on S. 719 and I would like to ask—and I know this may be considered superfluous or irrelevant or whatever—were your comments today, and was your position taken on this legislation, with or without the advice of any consulting firm or any outside group other than officials or personnel of the Office of Management and Budget?

Mr. SOWLE. No, sir. I know of no participation other than by OMB staff in the preparation of this statement.

Senator PRYOR. Well, that brings me to my second question. Are you aware that OMB's comments today on the organizational conflict of interest provisions are identical—identical—to the comments being offered today by the National Council of Professional Services Firms, which is today represented by a very articulate and fine person, Ms. Laura Henderson? Do you know that those comments are identical?

Mr. SOWLE. No, sir, I didn't know that.

Senator PRYOR. Last August, last month, the Office of Management and Budget commented in a letter to Senator Roth, chairman of the Governmental Affairs Committee, in relation to section 205—and I will submit this for the record; I will not read it in its entirety.[1] It says, "Section 205 is replete with unworkable requirements that will substantially reduce the ability of Federal agencies to obtain professional services of the highest quality. Examples of the most objectionable of these requirements are the following:" and one, two, three, four, five areas of disagreement.

Then comes along the statement of Ms. Henderson and the organization that she does represent, the National Council of Professional Services Firms, which states, on page 7 of her comments, the organizational conflict of interest provisions contained in "Section 205 of S. 719, 'Organizational Conflict of Interest,' is replete with unworkable requirements which will substantially reduce the ability of Federal agencies to obtain the highest quality of professional services. Among the most significant of these requirements are:" . . . one, two, three, four, five.

Identical positions by the agency of government that we have charged with curtailing, overseeing, and bringing under control consulting abuses. I think it is somewhat paradoxical and ironic that we find here the National Council of Professional Services Firms adopting the identical position.

---

[1] See p. 163.

Mr. SOWLE. Let me assure you, Senator Pryor, that as far as I am concerned, and as far as I know, there has been no input by anyone to our statement today except by people in OMB.

I can't explain what you are pointing out. I don't know the reason for it.

Senator PRYOR. There was no relationship created between OMB and the National Council of Professional Services Firms in preparation of your position?

Mr. SOWLE. No, sir, not to my knowledge.

Senator PRYOR. I wonder if either of the other witnesses this morning might substantiate or deny such a relationship?

Ms. CARLSON. Well, I wrote Mr. Sowle's statement, and I wrote it by myself.

Senator PRYOR. Pardon?

Ms. CARLSON. I wrote it by myself.

Senator PRYOR. In the letter to Senator Roth from Mr. Edwin L. Harper, Deputy Director of OMB, who prepared the detailed comments of this letter? This was an August 1981 letter.

Mr. SOWLE. I am trying to find out who wrote it. I don't know, Senator Pryor.

Mr. Dietrich might shed some light on this.

Mr. DIETRICH. As far as I know, there was no collusion with respect to any position or information that we have provided to Congress. We didn't hire any consultants to prepare it. We didn't hire anyone to provide such information. We are required by law to operate in the sunshine, so everything we do is rather public. We do read a lot, and sometimes we use things that sound good, whether we pay for them to be developed or not. In this particular case, I don't know whether we wrote it and they used it, or we read it and adopted it because it sounded good. I don't think that there is anything wrong with absorbing all the information that we can, from whatever source.

Senator PRYOR. What you are telling the committee is that you may have adopted the identical position as espoused by the National Council of Professional Services Firms.

Mr. DIETRICH. Or they may have adopted a position identical to ours—yes, sir.

Senator PRYOR. Well, I will say that it appears to me that not only did they help write your testimony but they formed your position, which brings crystal clear the point that I have been trying to make for 2 years, that the consulting industry is making policy for this country. And I hate to see the consulting industry make policy for the Office of Management and Budget of this country. I don't know of anything more dangerous than that.

Mr. DIETRICH. Senator Pryor, I don't believe that is the case. I would deny that that is the case with respect to our testimony and the positions we have taken. Now, with all the information flowing in and out of our office, since we do operate in the sunshine, in accordance with the OFPP Act, I really couldn't say that we didn't have any inputs or outputs with respect to the position that we have taken.

Senator PRYOR. I am going to temporarily move from that issue and go to something a little more simple.

I have been listening and this committee has been hearing for 2 years now that the executive branch of Government was going to control consultants and had a plan to control consultants and the abuse of consulting services. I don't see any control taking place. I think that our patience has been extended to the breaking point, and I frankly would not think that legislation should be necessary in this area, but it is exactly for this reason, Mr. Sowle, that here we find the management function of the entire Federal system embodied in the Office of Management and Budget, here when we attempt legislatively to bring controls into this area, we find your agency, which should be on our side, basically opposing this attempt.

For two years we have heard, "well, there is a plan coming," or "we've got a new directive or a new circular or whatever." I just don't think it is working. I wonder if you would comment?

Mr. SOWLE. Yes, sir. I'd very much like to comment on that. The only data I've heard recently on abuses of consulting services, as I mentioned a little earlier this morning, are old data, going back prior to June of 1980.

Since June of 1980, there have been some seven different actions taken. I think the results of those actions are now evident in the dramatic decrease in the amount of dollars being spent for consulting services. I have no data on any abuses, and I have not heard of any significant abuses recently in this area.

Senator PRYOR. Well, consulting services are so hard to identify, which brings me to a point that you raised on page 5 of your testimony. I think that the testimony that we have is the same that you gave—the paragraph in the middle of the page where you state, "We have also made reductions in available funding for consulting and related services for fiscal years 1981 and 1982. These reductions are reflected in the President's revised budget for 1982."

Now, how many dollars have been reduced?

Mr. SOWLE. Contracts for consultant services in 1978 were $413 million. In 1979, $381 million was obligated; in 1980, $325 million; in 1981, $267 million. That is a fairly dramatic drop in the amount of money going into consulting service contracts.

Senator PRYOR. Are you talking millions or billions now?

Mr. SOWLE. Millions.

Senator PRYOR. Are you maintaining that in 1981 there were only $267 million in consulting contracts?

Mr. SOWLE. In consulting service contracts.

Senator PRYOR. For the entirety of the Federal Government?

Mr. SOWLE. For consulting service contracts, as taken from our Federal Procurement Data System.

Mr. DIETRICH. Yes; for the total Federal Government. That's using the definition that is in your bill and that we have been using.

Senator PRYOR. I thought I was correct. We find about $4 billion in consulting contracts. The GAO estimates somewhere around $10 million each day.

Mr. SOWLE. If you are talking about management support services and other kinds of services contracts, which are different from consulting services, the figure would be substantially different. In 1981, every kind of service—personnel appointments, consulting services,

advisory committee memberships, management and professional services, special studies and analyses, and management support for R. & D. activities—added up to $2.78 billion.

Senator PRYOR. Well, GAO evidently uses a definition that is different from the one utilized by OMB.

Mr. SOWLE. I think there has been a problem, Senator Pryor, of definition, and that's why we like the definition of consulting services you have in your bill, and that's the one we are talking to.

Senator PRYOR. If that's the one we are talking about, we are talking about a much greater outlay of expenditures than the $267 million or $381 million.

In order to clarify this section of our questioning this morning, I think it would behoove both your agency and myself if we might not have permission of the committee for us to submit a written addendum to the record.

Mr. SOWLE. Thank you, sir.

Senator PRYOR. We will do that in that way.

[The information referred to follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
SUBCOMMITTEE ON CIVIL SERVICE,
POST OFFICE, AND GENERAL SERVICES,
Washington, D.C., October 28, 1981.

Hon. JOHN C. DANFORTH,
Chairman, Subcommittee on Federal Expenditures, Research, and Rules, Governmental Affairs Committee, Washington, D.C.

DEAR MR. CHAIRMAN: During the hearing of September 18, 1981 on S. 719, I engaged in a discussion with Mr. Donald Sowle, Administrator of the Office of Federal Procurement Policy regarding expenditures on consultant and related services. It was apparent that some confusion existed about the categories and costs of the services being discussed and I suggested that a clarification should be added to the record.

In lieu of further questions to Mr. Sowle. I believe the following explanatory note should clarify the hearing record on this point:

Because the OMB definition of consulting services is quite narrow, S. 719 includes management and professional services and special studies and analyses as well as consultant services within its coverage. Mr. Sowle's reference to expenditures of $267 million included only consulting services as defined by OMB, whereas the bill's coverage would extend to some $4 billion in expenditures in consultant and related services.

I hope this information will clarify the hearing record. I certainly appreciate your interest in this matter.

Sincerely,

DAVID PRYOR.

Senator PRYOR. I notice you made a reference to unsolicited proposals, Mr. Sowle.

Mr. SOWLE. Yes, sir.

Senator PRYOR. And I wonder what you are doing to curtail unsolicited proposals in the area of consulting contracts?

Mr. SOWLE. This is one of the considerations being addressed in the draft directives that we are working on now within OMB. In essence, we would preclude unsolicited proposals from resulting in sole source contracts for consulting services.

Senator PRYOR. You say that you are just considering this?

Mr. SOWLE. Well, it is in the process of development. It's not fully coordinated. But I think that is one area that I can safely say would be included in the final directive.

86-956 O - 82 - 3

Senator PRYOR. Well, this is an area, I think, of great abuse. I just hope that OMB will—regardless of what we do legislatively—I hope that OMB will crack down in this particular area because I think it has been abused.

Mr. Chairman, I am going to yield back to you at this time.

Senator DANFORTH. Thank you, Senator Pryor.

Thank you very much, Mr. Sowle.

Mr. SOWLE. Thank you, sir.

Senator DANFORTH. Our next witness is Mr. Arch Ramsay, Acting Deputy Director of the Office of Personnel Management.

Good morning, Mr. Ramsay. Please proceed.

TESTIMONY OF ARCH S. RAMSAY, ACTING DEPUTY DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ACCOMPANIED BY MORTON I. HORVITZ, CHIEF, OFFICE OF POLICY ANALYSIS AND DEVELOPMENT, STAFFING SERVICES, AND THOMAS F. O'CONNOR, POLICY ANALYST, STAFFING SERVICES

Mr. RAMSAY. Good morning, Mr. Chairman, Senator Pryor.

I am accompanied today by Mr. Morton Horvitz, on my right, who is head of the Office of Policy Analysis and Development in the Office of Personnel Management, and by Mr. Thomas O'Connor, on my left, who is also a member of that staff.

My statement is quite short and with your permission I would like to read it into the record.

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to present the views of the Office of Personnel Management on S. 719, the Consultant Reform and Disclosure Act of 1981. I would like to request that the Office of Personnel Management's report to the full committee on S. 719 be placed in the record.[1]

We recognize the concerns of Congress which led to the introduction of this legislation. Strengthening Government accountability is a primary objective of this administration. Holding agency managers accountable for the proper use of consulting services is essential to making sure that the American taxpayer gets the full benefit for every dollar spent. We appreciate the interest of this subcommittee in taking up this measure to strengthen Government accountability in this important area.

Federal agencies have two distinct ways of acquiring consulting services. One is by employment; the other is by contract with private firms or individuals. The general authority to hire consultants as Federal employees is section 3109 of title 5, United States Code. Contracting for services is under the procurement laws in title 41. S. 719 would reform agency use of consultants through changes in the personnel laws and the contract procurement laws.

Currently, section 3109 of title 5 permits agencies to hire a consultant or an expert for temporary—not to exceed 1 year—or intermittent services, provided the agencies have specific statutory authorization. This section excepts such appointments from key civil service personnel laws requiring competitive examination, position classi-

[1] See p. 169.

fication, and General Schedule pay levels. However, it places a general limit on pay, which is the daily rate for grade GS–15 or grade GS–18, depending on the job. At present pay scales, this means a consultant may be paid up to $192 per each day worked. The authority may not be used to fill Senior Executive Service positions.

OPM is concerned only with the employment of experts and consultants which represents a small part of the Government's use of consulting services. As of March 1981, about 6,200 were employed, mostly on a when-needed basis. The Office of Management and Budget is responsible for overall executive branch policy on procurement, including policy on contracting for consulting services. While we have some concerns over the contracting provisions of title II, we defer to OMB's views on those aspects of the bill. Our main interest is title I of S. 719 which would amend section 3109 of title 5.

Section 3109 has been a source of longstanding problems, such as confusion between employment and contracting, absence of a central oversight agency, lack of basic definitions of "expert" and "consultant," multiplication of specific authorities, and ambiguity over daily pay rates. Title I of S. 719 would correct many of these deficiencies.

We have long sought to assure that agencies use consultants properly and that the merit hiring system is protected from improper exceptions. We issue written guidance to agencies in the Federal Personnel Manual, conduct onsite evaluations, and monitor employment data from agencies; but we feel legislative action is needed for effective oversight and administration of consultant employment.

We support the changes title I would make, with certain reservations. I will take up each of them briefly at this time.

One is elimination of reference to procuring consulting services by contract. One of the problems with section 3109 is that it speaks of obtaining the services of experts and consultants as Federal employees by contract. This is a continuing source of confusion to agencies since most contracts for services are made under the procurement laws, not the personnel laws. Such contracts are not intended to create an employer-employee relationship.

The confusion started back in 1946 when, in attempting to consolidate many separate agency statutes, appointment and contracting authorities were merged together in a single provision.

This leads to uncertainty about whether employment or something else is involved when an individual's services are procured by contract under section 3109; that is, whether these are really personnel appointments in the usual sense. The provision for contracting for personal services in section 3109 tends to blur the generally accepted boundaries between "procurement" and "employment" and should be eliminated.

Taking the contracting language out of section 3109 would not affect agency authority under procurement laws to contract for services since these are not employer-employee relationships. It is important to note that the oversight role of the Office of Personnel Management for experts and consultants would be concerned solely with those who serve the Government as Federal employees. The field of procurement management, of contracting for goods and services, is a world apart and subject to other statutes and oversight by other agencies.

Two is creation of a central enforcement authority. Section 3109 does not give regulatory authority to any agency. In the past, the former Civil Service Commission asserted technical jurisdiction because it was responsible for determining coverage under the civil service and classification laws. Misuse of the authority was, in effect, an illegal exception from those laws. In recent years, in attempting to respond to agency challenges on legal grounds to its authority in this area, the Commission found there was legal support for preventing misuse based on those laws.

Authority to enforce the statute, to prescribe regulations, and to take corrective actions would give necessary legal support to the Office of Personnel Management's onsite evaluation and agency self-policing efforts. Authority to use the section would rest with the management of each agency, subject to regulation and oversight by the Office of Personnel Management.

The Office would see that the criteria for experts and consultants and the time limits on duration of service were applied. We would be able to protect regular, continuing job opportunities for career employees against improper assignment of experts and consultants and guard against use of this authority for work which ought to be in the Senior Executive Service.

Three is the definition of "expert" and "consultant" in the law. The present statute does not define key terms, although administrative definitions have been developed over the years in the instructions of the former Civil Service Commission and in Comptroller General decisions. Placing these definitions in the law itself, as provided in title I, would set out clear criteria for agencies to use in determining whether section 3109 would be appropriate in filling a particular position.

Four is the establishment of the top pay rate at grade GS–18. The bill would set grade GS–18 as the general maximum pay rate for jobs in agencies subject to the classification and General Schedule pay laws. This is a conforming change to give all agencies authority to pay up to the same general maximum. In recent years, Congress has authorized the grade GS–18 rate when establishing new agencies.

There are two provisions in title I which I believe should be changed.

One is the requirement on page 5, line 14, that an agency must have a specific statutory authority in order to use section 3109. It should be dropped. Unlike most other statutory authorities, section 3109 cannot be used directly. Instead, an agency first must have another provision in its appropriation or enabling statutes saying it may use section 3109. This, we feel, is an unnecessary step which leaves the way open for inconsistencies in terms and conditions of employment.

Sixty specific authorities appear in permanent legislation. Others appear annually in appropriation acts. The General Accounting Office some time ago recommended simplifying the section to provide a self-contained authority for hiring experts and consultants by eliminating the requirement for authorizing language in organic or appropriation acts. Needless to say, elimination of the need for separate statutory authority for each agency in no way would preclude Congress from placing appropriations or other limitations on an agency's use of experts and consultants.

Two is the definition of "agency" on page 4, line 20. It should be cited as section 5721 rather than section 552(e). We do not know why this change is being proposed. Use of the 552(e) definition of "agency" would bring Government-controlled corporations within the scope of section 3109, but would remove the judicial and legislative branch agencies covered under the present definition. We do not favor this new definition because it would (1) deprive some agencies which may need such authority and (2) provide authority to Government-controlled corporations which may not need it because many operate under special laws outside the civil service system.

Thank you for the opportunity to provide our comments on the personnel provisions of S. 719. I will be happy to answer any questions.

Senator DANFORTH. Mr. Ramsay, let me just pose one question to you and ask for your views on the extent of the problem—what, if anything, could be done about it.

Is it the case, is it widespread, that agencies of the Federal Government, limited in the number of personnel which they can hire, limited in the amount which they pay individuals, particularly very competent individuals, have people leave the agency because they are not making enough money and then they turn around, as soon as they get out, and become consultants and are hired back to do substantially the same thing as they did before, however, at considerably higher remuneration than was the case when they were employees of the agency?

Mr. RAMSAY. Mr. Chairman, as the Director of the Office of Personnel Management testified earlier this week, pay caps do have an effect on driving people out of the Federal Government and taking advantage of retirement opportunities. If an individual retires and returns to the Federal Government as an employee under a consultant appointment, there is no particular advantage to him because he does not get his full salary plus his annuity. There is an offset so that he would not draw anymore than he would if he were a full-time employee.

However, if a former employee, now retired, were to join a private consulting firm, and that consulting firm were to receive a contract, then it would be possible for him not only to draw his annuity but also whatever pay he would receive from that contracting firm.

Senator DANFORTH. Is this widespread or not?

Mr. RAMSAY. We don't have any figures on that, Mr. Chairman, in terms of numbers. We do know that the Office of Management and Budget has instructed agencies not to give preference to ex-employees in the granting of such contracts.

Senator DANFORTH. Does that mean anything? Let's suppose an agency is doing something that is reasonably sophisticated and it has someone in its employment who has developed great skill in this area and this individual says, "Well, I'm sorry. I'm leaving; I'm going into the consulting business." The agency wants somebody who is skilled, who is competent, who knows its problems. It can say, "We're not going to give you preference," but what does that mean?

Mr. RAMSAY. Well, what it means is that the agencies are certainly not supposed to limit their consideration of consultant firms to those that are headed up by ex-employees of their agency.

Senator DANFORTH. But as a practical matter, if you were running an agency and you wanted somebody who you knew would do a good job, you'd want this individual, wouldn't you?

Mr. RAMSAY. If those are skilled and talented people, I probably would, Mr. Chairman. The point I was making is, I do not have any information on the extent of that practice.

Senator DANFORTH. Would Senator Pryor's bill provide that information, if this bill were in place? Would that provide information on the extent of this practice?

Mr. RAMSAY. I am not really conversant with all of the sections of the bill. I understand the bill does have a general authority for us to gather additional information. In the past, we have not gathered information about people who are hired under contracts by the Federal Government. Our data systems have primarily been related to those people who are employed by the Federal Government, not whose services are obtained under contract.

Senator DANFORTH. Senator Pryor?

Senator PRYOR. If I could apologize to you, Mr. Chairman, and Mr. Ramsay. I have about a 30-second statement that I want to read into the record so we can help to clarify a point that I was trying to make with the previous witness. I would like to ask a point of personal privilege. My staff has been informed by Ms. Henderson and the National Council of Professional Services Firms, represented here today—they will ultimately testify—and the Council attorney, that the comments in her testimony, drafted for delivery this morning, were drafted last April, long before OMB's comments were sent to Senator Roth, without any assistance or consultation with the Office of Management and Budget. Since an impression may have been left that the council, the National Council of Professional Services Firms, got its ideas from OMB, I think this comment at this point ought to be in the record to clarify any misunderstanding.

Therefore, in regard to the National Council of Professional Services Firms, it is their position—we will confirm that shortly, I think—that they did their work separately and before the Office of Management and Budget acted.

If this is true, the question then must be—how did the Office of Management and Budget decide to use the consulting industry's view verbatim, as its own position, as expressed this morning. And also the question is—did, in fact, the Office of Management and Budget do its own work, how was it advised, and why did the Office of Management and Budget adopt verbatim the view of the consulting industry.

Now, I assume, Mr. Chairman, that testimony later this morning will help to clarify these questions with regard to this relationship.

Mr. Chairman, I only have one or two comments to Mr. Ramsay, if I still have some time, and I believe I do.

I deeply appreciate, Mr. Ramsay, what I consider to be a supportive viewpoint of this legislation, and I recognize that you feel there are some modifications that might need to be made and you don't endorse it 100 percent. I want you to know, and I pledge to you, that I will work with you and your staff in trying to work out any refinements of this legislation that you think will be productive or constructive.

Last year, in a June 5, 1980, report, the General Accounting Office stated, and I quote,

OPM has established an office of consulting services to advise and assist other agencies in various personnel management areas, such as performance appraisal,

general management analysis, and financial management. This office not only assists other agencies in acquiring consulting services from the private sector, it also provides consulting services directly.

And I think certainly that was a step forward. I commend the Office of Personnel Management for doing this. "While we have not assessed the Office," again the GAO commenting, "assessed the Office of Consulting Services' performance, it is an encouraging development that merits attention by other agencies having a high level of expertise in other fields."

I'd like to ask how this program is progressing, and has it saved any money?

Mr. RAMSAY. Senator Pryor, that program had a rather promising start. Unfortunately, it is one of the programs that has fallen victim to the budget cutbacks which we have had to put in place, and it has been one of the programs which has been discontinued.

Senator PRYOR. That program was killed, is that correct?

Mr. RAMSAY. That is correct.

Senator PRYOR. Where was the pressure to kill that program? Where did it come from?

Mr. RAMSAY. I think it was primarily budget pressures, Senator. I don't know of any particular pressure from any organization or group for us to discontinue that.

Senator PRYOR. I wonder if any of the other witnesses this morning, at the table, might have any comments on that? Do they know any more about the pressures that brought about the demise of the Office of Consulting Services?

Mr. HORVITZ. I am certainly not aware of any.

Mr. O'CONNOR. Nor am I, Senator.

Senator PRYOR. That's all I have.

Senator DANFORTH. Thank you, Senator Pryor.

Thank you, gentlemen, for being with us this morning.

Our next witness is Karen Williams, who was Administrator of the Office of Federal Procurement Policy in the Carter administration.

TESTIMONY OF KAREN HASTIE WILLIAMS, ATTORNEY, CROWELL & MORING, AND FORMER ADMINISTRATOR OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

Ms. WILLIAMS. Thank you, Senator Danforth.

Mr. Chairman and members of the committee, I am very pleased to appear here today before the subcommittee as it begins its consideration of S. 719, the Consultant Reform and Disclosure Act of 1981, introduced by Senator Pryor.

I have a fully prepared statement that I have submitted to the committee, and I would ask that it be included in its entirety in the record, and I will just summarize my comments this morning.

Senator DANFORTH. Without objection, your full statement will be made a part of the record of this hearing at the conclusion of your testimony.

Ms. WILLIAMS. Let me say at the outset that the opinions that I express are my own and not necessarily those of my law firm and reflect my experience both in the private practice of law and in Government service.

As you are well aware, Mr. Chairman, the use of consulting service organizations in various capacities by the Federal Government, and by State and local governments as well, has burgeoned over the last few decades as legislative mandates and various Federal programs have increased.

In light of these demands, it seems to me that the question is not whether consulting services should be used but how they can best be used to serve the legitimate needs of the Congress, of the Federal agencies, and the public as a whole.

In this regard, I agree with the basic objectives of S. 719 and commend Senator Pryor for his untiring efforts in this area. The basic objective, as I see it, of S. 719 is that the Government's consulting arrangements should, whenever possible, be subject to public disclosure and that stringent management controls and Federal agencies' daily operations are the best assurance of the continued integrity in the procurement of these services.

As the subcommittee grapples with the most effective method to achieve these goals, however, I would reiterate a statement that I made here a year ago when I was in public office, and that is, namely, that good management cannot be legislated. I firmly believe that the aggressive efforts of the Office of Management and Budget and within OMB, the Office of Federal Procurement Policy, working together, to promise agency control of consulting services contracts, can improve Federal procurement policies across-the-board and will achieve the objectives inherent in S. 719 without the need for this legislation.

Admittedly, management reform is a long and tedious process, but it is perhaps the only way to insure real and lasting reform, reform that will endure regardless of changing governmental needs and priorities that could make comparable legislation obsolete.

Before addressing the specific provisions of S. 719, I would comment just briefly on the steps that have been taken by OFPP and the Federal agencies to insure that the Government receives impartial advice and adequate competition under its consulting service contracts. I think the testimony that you have heard so far this morning and the questions that have come from members of the committee indicate your very real concern with the question of competition in obtaining these consulting services contracts.

It seems to me that the initiatives that have been taken by OMB have recognized key problem areas. GAO's activity has recognized several problem areas—the difficulty in identifying expenditures for consulting services, the problem of sole-source awards, the problem of inadequate justification for the use of consulting services as compared with in-house expertise, possible duplication of consulting studies, and ineffective management controls.

You have heard already this morning about OMB's initiatives and their success, I believe, in reducing the use of consulting services under OMB Circular A–120, and I won't belabor that discussion.

I would just note that there has been criticism of the definition of consulting services as defined by OMB. Some have suggested that the definition is too narrow. Others have suggested that it is too broad.

I believe that it is appropriate that the definition of consulting services be limited to advice on governmental functions as now is provided

by OMB. As written, it does not conflict with OMB's Circular A–76 on contracting out work for commercial goods and services. It maintains the basic policy of the Federal Government which has been in existence in Democratic and Republican administrations alike; namely, to rely on the private sector to the maximum extent possible for such services where it is economical to do so.

Circular A–76 is a valuable tool for Federal agencies operating under budget restraints. I believe that contracting out is an important part of making the Government work and helping the Government provide services efficiently to the American taxpayer.

I think we will run into significant problems if the Congress legislates in an area that mixes the contracting out requirements with the limitations on use of consulting services by broadening the definition of consulting services to include contracts which are now included within the definition of A–76.

It seems to me that the initiatives taken by OMB and the trend in reduction of the use of consulting services has come from the hearings that have been held by this committee over the last several years. It has come from pressure by OMB. And I think it is showing results, and I think the committee is to be commended for its efforts in this area.

Federal agencies have been directed by OMB to develop detailed management control systems for all procurement practices. I think it is important to consider the use of consulting services within the context of the procurement process generally.

With regard to consulting services and the procurement process generally, I think that the Congress and the executive branch have recognized a need for significant reform. OFPP has underway—and will submit to the Congress, I understand, next month—a major legislative recommendation in this area. I think it will build on the management directives that have already been issued by OMB and will help look at the use of consulting services in the context of the procurement system generally.

With respect to congressional concerns over potential conflicts of interest under consulting services contracts, as you are aware, OMB has issued for comment a segment of the comprehensive Federal acquisition regulation on organizational conflicts of interest. That subpart of the FAR prescribes responsibilities and general rules and procedures for identifying, evaluating, and resolving organizational conflicts of interest. It defines organizational conflicts of interest and applies to all types of acquisitions.

However, there are certain contracts that are specifically listed as particularly suspect to conflicts of interest to give contracting officers a red alert, if you will, for looking for conflicts in these situations. They include: Management support services, consultant or other professional services, contractor performance of or assistance in technical evaluations, and R. & D. work performed by a contractor that does not have overall responsibility for development or production.

It seems to me if further information concerning a prospective contractor's interests and relationships is necessary to identify potential conflicts of interest, contracting officers should have the flexibility to obtain that information by contacting other Government agencies, or

from other public sources, or through direct negotiations with the contractor.

The FAR provides for this and indeed recognizes that refusal to supply such information may be grounds for denial of the contract award. I believe that the protections that are provided for in the FAR look to both the nature and the duration of any proposed restraints and would protect the interests of the Federal Government.

Mr. Chairman, OMB and the Federal agencies recognize the need for management controls and public disclosure to curtail abuses in the use of consulting services contracts. I am confident that the agency management controls put in place by OMB, coupled with aggressive implementation of these controls by the budget examiners, and by the OFPP, can and will lead to lasting reforms.

There is no quick fix for the abuses where they exist, and it seems to me that the Congress and the executive branch will benefit from lasting institutional reforms.

Given the continued efforts of the past administration and the current administration to recognize this problem and to institute management controls, I believe that legislation to accomplish these goals is unnecessary. Further, I believe that any legislation specifically directed at consulting services is, at this time, premature. As I suggested a few minutes ago, OFPP is developing its Federal procurement system legislative proposal and that proposal, as I understand it, will provide for an orderly and rational development of comprehensive procurement reforms. This committee, as well as other committees of the Congress, will have an opportunity to look at that proposal and to reflect on the concerns that have arisen during these hearings and other hearings and develop a comprehensive response to the issue of procurement reform.

Looking at the specific provisions of S. 719, my prepared statement goes into concerns that I have, based on the definition that is in the legislation, as well as concerns with respect to title II, which would mandate, I believe, unnecessary expansion of reporting and publication requirements. For example, for consulting services contracts, there would be additional reporting requirements without what seems to me to be any commensurate gain with respect to accountability or the concerns expressed by this committee.

I cannot overemphasize my view that sound management controls really cannot be legislated, and I believe it is in the interest of the taxpayer and in the interest of the committee to work with the Office of Management and Budget and with the agencies in implementing effective management controls.

Mr. Chairman, let me stop there and ask that my prepared remarks be included, in their entirety, in the record. I would be pleased to respond now to any questions that you or other members of the committee may have.

Senator DANFORTH. Thank you, Ms. Williams. Your entire statement will be included in the record in full.

Let me just ask you this, and it's really, I guess, the same question I asked Mr. Sowle. Do you view Senator Pryor's efforts to set out restrictions or controls on consultants as being unnecessary because it can be done administratively, or do you believe that to be a negative?

For somebody to say—and you and Mr. Sowle have essentially made the same point—that this can be done by OMB or it can be done by the agencies and, therefore, there shouldn't be any statute, is that because the statute is unnecessary or is it because the statute is somehow a minus rather than a plus?

Ms. WILLIAMS. I think it is because it is unnecessary, Mr. Chairman. As I indicated, I think the objectives set out in Senator Pryor's testimony and in his bill are consistent with the basic objectives of both the past administration and the current administration in this area.

I think Mr. Sowle and I share a concern with respect to the flexibility that we feel is necessary to allow the agencies to operate in this area. I share the concerns that he has expressed with respect to disclosure and controls—keeping track of where the dollars are going—and I think that those are very valid concerns.

But I do believe that we have systems in place that can do that. I understand and I have shared his frustration with the time that has elapsed since this issue has been the focus of congressional and executive branch inquiry. I think that both of you have been part of the Washington scene for a number of years and understand the difficulties in moving agencies forward.

OMB is using its budget clout, which, as you well know, is very considerable, in an effort to move the agencies toward recognition that management of Federal dollars is as important and, in some instances, more important than the question of just simply keeping track of how many dollars are being spent.

So I would say that it is not a negative in the context that you pose that question. I just feel, based on my experience, that it is unnecessary to enact legislation addressing those kinds of controls.

Senator DANFORTH. Senator Pryor?

Senator PRYOR. You say it is unnecessary to put in legislation those restrictions that this bill encompasses. Aren't you pretty well saying that Congress should stay out of the decision?

Ms. WILLIAMS. No, not at all, Senator Pryor. I think Congress has a legitimate concern with respect to how Federal dollars are being expended. This committee has oversight over the Federal budget and over the Office of Management and Budget, so I think it is a legitimate issue for the Congress to raise questions about and to explore, but I do not feel that it is necessary to have a statute that essentially duplicates the work that is already being done by the agencies. And I think that Congress cannot legislate the day-to-day operations of the agencies. Congress has some very real, broad areas of concern. I know this committee has been working on questions of regulatory reform and other important comprehensive matters, and I think that is certainly appropriate.

But I feel that when the Congress begins to try to legislate the details of the day-to-day management of an agency, that is a line that is more appropriately directed from the executive branch and from the Office of Management and Budget.

Senator PRYOR. You plead before this committee this morning for some—a term you have used several times—flexibility. We, the Congress, have extended massive flexibility, in fact, unchecked flexibility,

to the executive branch. And today we see $10 million a day being spent for consulting services. Today we see unaccountability. We see agencies that have, in many instances, no records on how consulting contracts were awarded. We cannot find out who gave the consent to award those contracts. We see, in the Pentagon, for example, 82 percent or 211 of 256 contracts drawn from the files—82 percent were granted without competitive bid according to a GAO report in March 1981. We see also another GAO report on six civilian agencies, drawing 74 of 111 contracts at random, 67 percent of those contracts granted without competitive bid whatsoever. We've given too much flexibility to the executive branch of Government.

I think these figures clearly demonstrate this. We see, I think, not only a very cozy relationship, but also, what I have said before, an incestuous relationship has developed in the contracting community between the agencies of the Federal Government and the contracting industry.

I wonder if you would comment on that?

Ms. WILLIAMS. Well, I would have two comments on your statement. I think that the need for more competition, and reduction of sole-source contracts, is one that the past administration and the present administration have recognized. I believe that the proposal coming from OFPP will make a strong recommendation to the Congress in the area of mandating greater competition as part of the reform of the procurement process.

I think that various agencies have been making efforts with various degrees of success in increasing the amount of competition in their contracts.

As to relationships between the contracting community and contracting officers, I believe that you would find that—over the past 10 years, let's say—there has been a significant increase in the number of contractors and the very contractors who are doing business with the Federal Government as a result of legislation passed by the Congress, for example, in the research and development area. This has increased the number of contracts going to small businesses, minority businesses, women-owned businesses, and the like.

There has been an effort to increase competition and broaden the supplier base of those doing business with the Federal Government.

I do know that GAO has been looking into this area and has produced several reports. And I think, while it is possible to always find cases where there have been abuses in the system, when we looked at it last year and developed our system of management controls, we directed the agencies to assure that there were specific individuals who were responsible for the decision to use consulting services contracts, that there was a justification that had been prepared, and that there was a subsequent evaluation made when a contract had been completed.

I have not been privy to the information that has come back to OMB, reporting on how well that implementation has gone forward. I do know, however, that the agencies have put these systems in place, have used the Inspector General system which this committee was responsible for putting into effect, to monitor what is happening in the agencies in this regard.

So I think that there are systems that are in place, and the speed with which the systems are able to reduce the use of consulting services contracts will depend on the aggressiveness of the implementation within the agencies and within OMB.

Senator PRYOR. You refer to OMB using its powers to enforce, let's say, good management practices, and the intent of Congress to save on waste, support more competitive bidding, and control unsolicited proposals. I am not paraphrasing you but hopefully I am expressing some of your thoughts. What do you think of OMB adopting verbatim this process for controlling consultants, the identical-to-the-word position as espoused by the contract industry in this town?

Ms. WILLIAMS. Senator Pryor, I was in the hearing room and heard the earlier discussion of that issue. I have no basis for making a judgment on that question and without information, I really could not comment on that matter.

Senator PRYOR. I have no further questions.

Senator DANFORTH. Thank you, Ms. Williams.

Ms. WILLIAMS. Thank you, Mr. Chairman.

[The prepared statement of Ms. Williams follows:]

FOR RELEASE
September 17, 1981
10:00 A.M.

Statement of Karen Hastie Williams
Before the
Federal Expenditures, Research and Rules Subcommittee
Senate Governmental Affairs Committee
September 17, 1981

Mr. Chairman and Members of the Subcommittee:

My name is Karen Hastie Williams. I am an attorney in private practice, specializing in public contract law and legislation with the Washington, D.C. firm of Crowell & Moring. Prior to entering private practice, I served as Chief Counsel to the Senate Budget Committee staff and most recently as Administrator of the Office of Federal Procurement Policy.

I am pleased to appear before the subcommittee today as it begins consideration of S. 719, the "Consultant Reform and Disclosure Act of 1981," introduced by Senator David Pryor (D-Ark.). The opinions expressed herein are my own, not necessarily those of my firm, and reflect my experience both in private practice and Government service.

Mr. Chairman, as you are well aware, the use of consulting service organizations in various capacities by the Federal Government has burgeoned over the last few decades as congressional mandates and federal programs have increased. In light of these demands, the question is not <u>whether</u> consulting services should be used, but <u>how</u> they can best be used to serve the legitimate needs

of Congress, the federal agencies, and the public.*/ In this regard, I agree with the basic objectives of S. 719--that the Government's consulting arrangements should, whenever possible, be subject to public disclosure, and that stringent management controls in federal agencies' daily operations are the best assurance of continued integrity in the procurement of these services.

As the subcommittee grapples with the most effective method to achieve these goals, however, it is important to note that good management cannot be legislated. I firmly believe that the aggressive efforts of the Office of Management and Budget and the Office of Federal Procurement Policy to promote agency control of consulting service contracts and improve federal procurement policies across-the-board will achieve the objectives of S. 719 -- without legislation.

Admittedly, management reform is a long and tedious process, but it is perhaps the only way to ensure real, lasting reform -- reform that will endure regardless of changing governmental needs and priorities that could make comparable legislation obsolete.

Before addressing the specific provisions of S. 719, I would like to outline briefly the steps being taken by OFPP and the

---

*/ The General Accounting Office has repeatedly stated that "[t]he proper use of consulting services is a normal, legitimate and economical way to improve Government services and operations. Agencies must continue to have the option to use consulting services where appropriate." (FPCD-80-48, June 5, 1980) (Emphasis added.)

federal agencies to ensure that the Government receives impartial advice and adequate competition under its consulting service contracts. These initiatives address five key problem areas recognized by Congress, the General Accounting Office, and the Executive Branch: (1) difficulty in identifying expenditures for consulting services; (2) sole source award of consulting contracts; (3) inadequate justifications for using consultants as opposed to in-house expertise; (4) duplication of consultant studies; and (5) ineffective management controls to assure the proper use of consultant services.

In April 1980, OMB issued Circular A-120, which established permanent policies and guidelines to be followed by agencies in determining when and how to use consulting services. The Circular applies to procurement contracts; personnel appointments; and advisory committees. Consulting services are defined in the Circular as "those services of a purely advisory nature relating to the governmental functions of agency administration and management and agency program management."

Despite various criticisms of this definition as overly narrow on the one hand, and vague and hard to interpret on the other hand, I feel that the Circular's narrow definition of consulting services as advice on governmental functions is appropriate. As written, it does not conflict with OMB Circular A-76 policies on contracting-out for commercial goods or services. It maintains

the basic policy of reliance on the private sector for such services when it is most economical to do so.

Circular A-120 expressly forbids use of professional firms to perform policy/decision-making or managerial work that is the direct responsibility of agency officials. It also prohibits the use of such services on an ongoing basis (the inference being that if a task is repetitive or ongoing, the agency should develop in-house capability), and the use of consultants to specifically aid in influencing or enacting legislation. Finally, the Circular requires federal agencies to develop management controls to assure that consulting service contracts are justified adequately and that potential conflicts of interest are disclosed prior to contract award.

The issuance of Circular A-120 was followed by OMB Bulletins 80-9 and 81-8, which required federal agencies to reduce their use of consulting services by 15% for FY 1981 and an additional 5% for FY 1981 and FY 1982, respectively. In addition, OMB is working now with the agencies to implement another half million dollar reduction in consulting and other services mandated by the Supplemental Appropriations and Rescission Act of 1981. The net effect of these cutbacks is about a 35% reduction in the use of consulting services on a government- wide basis.

In addition to the actions stated above, federal agencies have also developed detailed management control systems for all procurement practices in response to an OMB directive of July 2,

96-956 O - 82 - 4

1980. With regard to consultant services in particular, the memo required that a career Senior Executive Service (SES) manager be responsible for certifying the need for individual consultant contracts, and for assuring that the requirements of A-120 were met. The memo also: (1) raised the approval level for proposed consulting service contracts of $50,000 or more to an official of Assistant Secretary or equivalent rank; (2) required agency-wide procedures to assure regular written evaluations of the performance of each consulting service contractor; and (3) required a report on the planned use of consulting services, including projected obligations and justification of needs, to be submitted with the agency's formal budget request to OMB.

In compliance with the July 2 directive all the federal agencies have submitted management improvement plans for their procurement practices and have taken steps to improve consulting service acquisition. These plans basically track the requirements outlined in the directive; I understand, however, that in a number of cases the agencies have proposed controls over and above those required in the OMB memo.

With respect to congressional concerns over potential conflicts of interest under consulting service contracts, OMB has issued for comment a segment of the draft Federal Acquisition Regulation (FAR) on Organizational Conflicts of Interest (Subpart 9.5 of Part 9, Contractor Qualifications). The subpart prescribes responsibilities, general rules, and procedures for identifying,

evaluating, and resolving organizational conflicts of interest. The FAR (9.501) defines "organizational conflict of interest" as

> a situation in which the nature of the work under a proposed Government contract and a prospective contractor's organizational, financial, contractual, or other interests are such that (a) award of the contract may result in an unfair competitive advantage or (b) the contractor's objectivity in performing the contract work may be impaired.

The subpart applies to all types of acquisitions; however, the following types of contracts are listed as particularly susceptible to conflicts of interest:

- Management support services;
- Consultant or other professional services;
- Contractor performance of or assistance in technical evaluations; and
- R&D work performed by a contractor that does not have overall responsibility for development or production.

If further information concerning a prospective contractor's interests and relationships is necessary to identify potential conflicts of interest, contracting officers are directed to seek it from within the Government or through public sources initially. If additional information is needed, the contractor will be asked to supply it. Refusal to supply such information may be grounds for denial of contract award. If a potential conflict of interest is uncovered, the contracting officer is to design a solicitation clause--tailored to the specific circumstances--to mitigate the potential conflict. The clause, to be negotiated with the

successful offeror, will specify both the nature and the duration of the proposed restraint.

Mr. Chairman, OMB and the federal agencies recognize the need for management controls and public disclosure to curtail abuses in the use of consulting service contracts. I am confident that new agency management controls, coupled with the stringent budget review policies already in place will lead to lasting institutional reforms.

Given the deliberate and continuing efforts by the prior and current Administrations to control the use of consulting services, I feel that legislation to accomplish these goals is unnecessary. Further, I believe that legislation specifically directed at consulting services is premature. I would suggest that the OFPP's Federal Procurement System legislative proposal to be submitted to Congress in October will offer a more orderly, rational opportunity for development of comprehensive procurement reforms, including whatever action in terms of principles or policy guidelines may be necessary.

Turning to the specific provisions of S. 719, I am quite concerned with the scope of this bill. As written, the legislation applies to consulting services, management and professional services, and special "study-type" or "report-type" contracts. I submit to the subcommittee that this "catch-all" approach for addressing the problems of consulting service abuse is a mistake. It will merely cause more confusion within the agencies and will

not lead to a clearer understanding by Congress and the taxpayers as to how public monies are spent.

Although I generally oppose any attempt to legislate management reforms, Title I's provisions concerning agency use of consultants and experts are not objectionable. These changes represent a simple clarification, rather than an expansion, of existing law regarding agency use of individual consultants.

Title II of the bill, however, imposes disclosure and reporting requirements that are unnecessary, unreasonable and unworkable. For instance, Section 202 would mandate publication in the Commerce Business Daily of all proposed consulting, professional, and management services contract actions in excess of $10,000. It would also require all modifications of such contracts that increase the amount of the award by at least $25,000 to be reported to the agency's Inspector General. This would place an horrendous burden on federal agencies with no commensurate gains in accountability. I cannot over-emphasize that sound management controls cannot be legislated. That is the responsibility and duty of the agencies, with appropriate guidance and direction from OMB. The proposed Federal Procurement System, which will address all government contracting, will give agencies the sound framework from which to manage and control their procurement activities.

I also find Section 205's organizational conflict of interest provisions extremely disturbing. Prevention of such conflicts is of course essential to preserve the integrity of the federal procurement process and to assure that governmental decisions are

based on sound, unbiased data. However, it make no sense to apply such provisions on an arbitrary test basis to selected agencies. Across-the-board coverage, as contemplated by the FAR guidance which I discussed earlier, is preferable to piecemeal application of these provisions. Moreover, the FAR contains safeguards that basically mirror those proposed in S. 719, without the rigidity of a statute.

Like its predecessor bill, S. 2880, S. 719 would require agencies to forward to OMB itemized statements of their requests for consultant funds for each fiscal year. In addition, the President would be required to list separately each agency's consultant contract fund requests in his budget proposal. Mr. Chairman, this requirement would be extremely burdensome and would clearly be at odds with the Administration's efforts to cut unnecessary paperwork and regulation. A more practical approach would be to have each agency submit information on consulting services directly to their House and Senate Appropriations Committees and to OMB as part of their program justification as is now required.

I share the subcommittee's concerns, as reflected in S. 719, that consulting service contracts should be awarded subject to competitive procedures and accompanied by appropriate management controls. To accomplish these goals, I would recommend that Congress take the following actions:

- Through appropriate oversight committees, support full implementation of existing OMB directives on the use of consulting services.

Request that OMB advise Congress of the agencies' implementation of OMB Circular A-120 and other related directives.

Request that the appropriate House and Senate Appropriations Committees carefully review agencies' FY 1983 budget requests with respect to in-house vs. contractor services.

- Seek a report on the system of Inspector General oversight of the procurement system in general and the acquisition of consulting services in particular.

- Await the submission of the Federal Procurement System's proposed guidelines on competition in contracting, procurement management controls, and public disclosure of contractor conflicts. This subcommittee's participation in hearings on the Federal Procurement System will provide an appropriate vehicle for the development of any necessary reforms through a comprehensive statute.

That concludes my prepared remarks, Mr. Chairman. I will be happy to answer any questions you and your subcommittee members may have.

Senator DANFORTH. The next witnesses are Russell Richardson, Committee on Contracting Out, and Laura Henderson, Committee on Federal Contracting Practices.

Mr. Richardson, would you like to begin, please?

TESTIMONY OF RUSSELL W. RICHARDSON, CHAIRMAN, COMMITTEE ON CONTRACTING OUT, ARLINGTON, VA.

Mr. RICHARDSON. Thank you, sir.

Mr. Chairman, members of this subcommittee, my name is Russell Richardson and I am chairman of the Committee on Contracting Out, better known as COCO, which is a loose coalition of 25 industry associations. A large percentage of our membership is consultants, and we represent perhaps somewhere over 25 million private sector workers in our total membership.

I am going to digress somewhat from my prepared statement, which I ask to have included in the record, because a number of things have occurred here today on which I think we would like to make some generalized observations, if I may?

Senator DANFORTH. Without objection, your entire statement will be made a part of the record of this hearing following your testimony.

Mr. RICHARDSON. The first thing is that the proposed legislation has much in common with the legislation that was offered both in the House and in the Senate last year—and we testified in the House, before Congressman Harris.

We find S. 719 to contain some of the same flaws and misconceptions which concerned us then. In the first place, the horror stories which the media and others so dearly love to circulate have to be examined individually, and in an unbiased perspective, before they take real shape.

Too often the facts are twisted, ignored, or reported out of context, and innocent participants are publicly pilloried. Everyone gets into the act as it serves their purposes, and the familiar cries of waste, fraud, and abuse invariably imply a private sector whose greed and arrogance must be controlled and whose sticky fingers must be prevented from pillaging the public trough.

I have before me a copy of a GAO report to the Congress entitled "Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?" It was released by GAO in May 1981, and I commend it to anyone who is concerned with this waste, fraud, and abuse issue.

On page 7 appears a pie chart summarizing the results of GAO's investigations of some 77,000 fraud cases. Of these, 30 percent involves Federal employees while less than 1 percent involves Federal contractor employees.

The point must be made that it is virtually impossible for a contractor employee or a business entity to indulge in waste, fraud, or abuse unless one—or more—incompetent, careless, or crooked Federal employee is also involved, be it contracting officer, program monitor, or whatever.

In our view, the vast majority of responsible Federal employees know very well what is right and what is wrong, and act accordingly. For

those who compromise and sell their integrity, the penalties have been mild if they existed at all. More rules are not needed. What is needed is some old-fashioned discipline, promptly and fairly administered.

The certain knowledge that they will be held fully accountable and that meaningful penalties will be swiftly imposed on offenders is, in our view, the most effective remedy that can be prescribed.

Another element of S. 719 that gives us grave concern is the fact that despite its title and preamble language, when we get to title II, "Contracts," under "Definitions," we find these words in section 2 thereof:

> The term "contract" means (A) any agreement, including any amendment to or modification of an agreement, between the Government and a contractor for the procurement of goods and services.

The author's intentions may be limited to consultants, but use of these same words, not once but three times, effectively distorts his purpose and provides a Pandora's box of opportunity for the not inconsiderable forces dedicated to protecting the incumbent Federal work force and even expanding it.

We have yet to find a real live consultant who supplies goods, as that term is generally understood, to the Federal Government or anyone else, except perhaps as models or feasibility prototypes.

We have encountered similar language elsewhere and the opportunities for mischief are enormous. We take strong exception to this language, given the context and the avowed purpose of S. 719.

Mr. Chairman, may I ask the members of this subcommittee and the staff to contemplate the scope of the added bureaucracy and the work load that the reporting requirements of this bill would impose? In our opinion, the associated costs would far exceed the total losses attributed to fraud in the GAO's report. And in the last analysis, you cannot legislate integrity. Rules are an empty gesture if a punishment for violations is neither swift nor sure nor painful.

Another aspect of S. 719 which strikes us as both idealistic and unrealistic is its emphasis on competition in an area of performance which is almost totally professional in character, where the special expertise and skills sought are often totally unique to a single source and not definable to a range of suppliers.

This, we feel, is characteristic of professional consulting services in private life as well. We, as individual consumers, do not normally shop for specialized professional skills or advice. We do not seek the low bidder for our legal, medical, or tax advisers, but we do select that one whose skill and judgment we trust and, generally, with whom we have had satisfactory previous relationships.

It is also interesting that the alarmists continue to speak of conflict of interest, and cite instances of consultants or experts called in to evaluate the work of other consultants or experts. This is simply prudent where a critical question is involved, and it is no different from a private citizen who does not necessarily challenge his first doctor's diagnosis but, if the stakes are high, seeks corroboration or rejection by others possessing specialized credentials.

In last year's hearings in the House on H.R. 7674, one of our member companies was directly accused of a conflict of interest because it simultaneously was performing services for the Department of

Energy and the Government of Saudi Arabia. It sounded downright immoral to the critics of contracting out, but as the story unfolded, the work for DOE was in the area of solar energy and for the Saudis involved loading facilities in the Persian Gulf. The only connection was "energy," and that was enough to set all the alarms off.

If you will check on pages 4 and 5 of my written statement, you will find an interesting example where the Senate itself employed a qualified consultant and eventually proceeded to enact legislation substantially in accordance with his recommendations. I am sure that you gentlemen do not accept the premise that, as a result, this consultant was generating new law. Yet that is exactly the claim that many have advanced in asserting that consultants are usurping functions of the executive branch.

The buyer has to finally decide whether the advice he secured was sound and act accordingly. In our opinion, it is neither mysterious nor immoral.

Mr. Chairman, S. 719 cannot be disentangled from the entire issue of Government contracting for the goods and services it needs. It is a complex issue, further complicated by the Government's often dual role of both buyer and competitor.

Rather than add to the existing mass of laws, rules, and regulations, a most important first step would be to depoliticize the procurement process. Congress, despite its persistent criticisms of the executive branch in its calls for procurement reform, is itself an obstacle to an orderly, disciplined, and efficient procurement system. In 1981 alone, I know of at least four congressional actions which thwarted executive branch efforts to follow their own procedures as set forth in OMB Circular A–76, a policy which unfortunately too many experts have never studied nor understood.

In one instance, the Congressional Record carries a colloquy between two Members of the House sharing a common objective. They express horror at a proposed contract which met all of the tests of Circular A–76 because "the private sector employees are simply not qualified and cannot be considered reliable for this sensitive program." What they ignored is the fact that the private contractor is required under Circular A–76 to give first-job refusal rights to the incumbent Government workers, and had done so. Historically, 85 percent of those workers, except any who do not wish to, do go to work for the private sector, for the contractor, and at a wage structure mandated by the Department of Labor under the Service Contract Act.

Why then were these people fully qualified and reliable just as long as they were Federal employees but immediately suspect in the same areas the day they elected to accept private employment?

If this committee sincerely seeks the means to improve the procurement process, the most important first step, in our view, would be to give visible and aggressive support to Senate Joint Resolution 93—the House equivalent is House Joint Resolution 294—which seeks a return to the proper roles for Government and industry. It simply restates a 200-year-old tradition and was introduced in June 1981 by Senator Hayakawa, for himself, Mr. Hatch, and Mr. Nickles. I am not going to read it, but it is a matter of record and it is attached to my statement.

Such a declaration, however, enacted by the Congress, would help to discourage the exploitation of the U.S. taxpayer to serve narrow political ends. It would tend to discourage the continuing growth of Government and would encourage a return by Government to its governing role. It is indeed a contradiction under our free enterprise system to find Government competing with its own taxpaying industrial base, and using taxpayer dollars to do so.

We see a curiously paternalistic—you are going to shut me off. OK. Thank you very much.

[The prepared statement of Mr. Richardson, with attachments, follows:]

PREPARED STATEMENT OF RUSSELL W. RICHARDSON

Mr. Chairman and Committee Members. On behalf of the 25 associations and councils which make up the membership of the Committee On Contracting Out (COCO), I want to thank you for allowing us to present industry's views on the Consultant Reform and Disclosure Act of 1981, S. 719.

My name is Russell W. Richardson. I am the Chairman of COCO, whose membership represents over 28 million workers, more than half of whom are in small business. These workers are engaged in technical and professional, white collared and semi-skilled tasks, both for government and the private sector, mostly in what is referred to as the Service Industry.

I am going to take a minute to read a list of the member associations and councils because I want it to be clearly stated as to who these people are, and it will not take me long. There are 25 members:

Aerospace Industries Association, American Consulting Engineers Council, American Defense Preparedness Association, American Electronics Association, Associated General Contractors of America, Association of Media Producers, Association of Data Processing Service Organizations, Building Service Contractors Association International, Conference of American Small Business Organizations, Council of National Security Companies, Inc., Electronic Industries Association, Helicopter Association of America.

Information Industry Association, Legislative Council for Photogrammetry, Motor Vehicle Manufacturers Association of the U.S., Inc., National Association of Service Contractors, National Audio-Visual Association, Inc., National Council of Professional Services Firms, National Council of Technical Service Industries, National Security Industrial Association, National Small Business Association/National Small Business Legislative Council, National Tool & Die Association, National Utility Contractors Association, Printing Industries of America, Inc., Textile Rental Services Association of America (Appendix A).

All of the workers in the firms these organizations represent are in the private sector, that is they work for companies that compete in the market place for business. One market place for many of them is that created by the Federal Government. The Government processes billions of dollars worth of goods and services annually, and one small segment is the category of services described as consulting. Quite a few of the associations and councils in COCO do considerable consulting work for the Federal Government.

At this time, I would like to mention another piece of legislation in which we have a great interest, Senate Joint Resolution 93, introduced by Mr. Hayakawa (Appendix B., attached). This resolution reaffirms our Government's reliance on the private sector for goods and services, which includes these consulting services. Its passage is of great interest to the companies and workers in COCO and we hope you will be able to support it with your votes.

It is fair to say that recent press reports have painted a very unflattering picture of private consultants and contractors, their work for the Federal Government, and the government contracting process itself. They have created the impression that the Government is wasting all of its money on consultants and contractors, and that consultants and contractors are simply ripping the Government off. They regularly use the two terms interchangeably—which leads to some confusion. All consultants work for the Government on contract, but all contractors are certainly not consultants. Today we are discussing consultants, who do not manufacture goods or operate bases or perform other major contracting services for the Government.

Having read many of these press accounts, you would think that:

All private contracts are wasteful, noncompetitive, and perform work that could be done by a particular Government agency itself.

All the work done by private consultants is of little or no value, always comes in late, and always results in a cost overrun.

All consultants, once having obtained a contract, turn immediately around and hire someone else to do the work, which is wasteful, unnecessary, and useless in the first place.

You also would think that consultants are running the Government . . . making its policies . . . and that they are engaged in a conspiracy to promote private business interests at the expense of the Government. They accomplish this evil latter scheme, so the argument goes, by working both for government and the business interests that somehow run counter to the Government's. In other words, they are guilty of conflict of interest simply by virtue of working both for Government and the private sector.

In short, the press reports have created the impression that fraud, waste, and abuse are the rule in the Government consulting process.

I am here today to say "no" to those allegations, to say that, in my judgment, they are the exception to the rule . . . to say that by and large the Government receives high value for dollars spent on consulting services . . . that more often than not consultants deliver on time and at cost, and help Government achieve worthy and desired goals without making the Government's policy and without any conflict of interest.

There is a good news side to the Government consulting story, and it is the dominant theme of that story. Like most good news, however, it rarely gets told.

It is a story of service by the private sector to the Federal Government, a story of extraordinary private-sector contributions, the story of a valuable, private sector resource.

But this "good news" story has not been told. Instead, we have seen and heard a steady barrage of negatives concerning our industry—further widening the ever-growing and dangerous gap between Government and the private sector.

Mr. Chairman, I could cite numerous examples to support my statement that the consulting industry brings independence and objectivity and a no-axe-to-grind approach to the solving of problems for clients. But one may be especially telling because it involved legislation offered by the Administration and its Department of Energy.

The client in this case was the United States Senate, a special task force of the Budget Committee, to be exact, which asked a firm belonging to a COCO association to take a look at the now-adopted Synthetic Fuels Bill. Specifically, the task force wanted a study of the effectiveness of alternative Federal financing incentives for development of these synthetic fuels, and that was done with absolutely no regard for the fact that the firm also worked for the Department of Energy.

This consultant firm was driven in that effort not by any desire to please a "big" client whose goals and aims often run counter to the will of the Senate, but rather by the desire to give the Senate their best, independent and objective response to the question they had been asked to answer.

In the report and in testimony before the Budget Committee they stressed that no single incentive would be sufficient to meet legislative goals, but rather that a package of incentives would have to be selected.

Incidentally, these recommendations were incorporated into the legislation that became law last year. We are pleased that this study was used to provide a better piece of legislation, but it would be a mistake to conclude that consultants therefore make policy for the Congress of the United States. Or, enact laws.

Consultants do not make policy for their Government clients. And we do not have a conflict simply because we perform work for both Government and commercial clients whose goals and objectives may appear to conflict. We solve problems . . . in keeping with our best independent judgment, and we do not tailor our solutions to anyone's hidden agenda, Government officials or private businessperson.

This Committee rightfully has raised the question of whether consultants are making policy for the Government. But, to argue that consultants make policy simply because they suggest options that may have policy implications or provide possible solutions to problems is simplistic and grossly exaggerates a consultant's influence, and it assumes that Government agencies simply adopt our solutions without any evaluation . . . without any thought process.

In fact, we do not seek to influence, we do not bring dark and shadowy ulterior motives to bear on our problem-solving tasks.

We bring independence and objectivity to that process. Clients turn to us for assistance for that very reason since, for a host of reasons, they frequently cannot deal with a problem objectively. Often, of course, they just do not possess the in-house skills and expertise to solve their problems. And, in almost every case, they cannot make available the skilled Government employees to perform critical tasks. When a situation requires an immediate solution but will take many man-months of intense effort, the Government has a dilemma. The key knowledgeable individuals who could resolve the problem frequently cannot be made available. Hiring additional employees would be foolish if the task requires special expertise and is of relative brief duration. Hence, the consultant, who has the ability, can perform the task and be forgotten.

In the past 20 years, as the Federal Government has increased in size and complexity, the need for independent and economical expertise also has increased.

During any rapid growth period it is frequently the case that problem areas occur. Given the fact that it is highly unlikely that society, and hence its Government, will become less complicated, it should be our common task to seek out and remedy problems caused by this period of rapid development.

A logical first step would be to look for a detached source which may have been independently analyzing this arena. The Congress' U.S. General Accounting Office (GAO) is such an institution. Over the past 20 years the GAO has issued over 30 reports relative to consultants to the Government. Major GAO findings have concluded that:

The proper use of consulting services is a normal, legitimate, and economical way to improve government services and operations. Agencies must continue to have the option to use consulting services where appropriate.

There may be too much "sole source" contracting for consultant services.

There have been some instances of improper use of contract modifications to significantly change the scope and cost of consultant contracts.

The Government has been unable to properly define consultant services.

There is a potential for duplication of consulting services.

A disproportionate amount of all contracts are awarded in the final quarter of the fiscal year.

There is a need for enhanced procedural safeguards relative to the approval of consulting service contracts.

It may be worthwhile for each agency to establish an independent board to oversee the use and administration of consulting services.

Past efforts to improve agencies' management of consulting services have not been effective.

Conflicts of interest should be carefully scrutinized.

The Government should concentrate on improving the management of consultant services and not simply reduce them.

In addition to these findings, the GAO has recommended certain corrective actions. It is our view that the bill, as presently drafted, misses the point relative to the GAO findings. GAO, in lieu of recommending legislation such as the bill, has suggested or noted amongst other things, that:

They had not yet analyzed pending Office of Management and Budget (OMB) regulations covering conflicts of interest.

OMB should instruct Federal agencies to establish more rigorous procedures for approving consulting service contracts.

The Director of OMB and Congress should work in parallel to achieve a more uniform definition of consulting services.

On an interim basis, Congress should require each agency's Inspector General to evaluate and report on the progress being made in the area of consultant contracting.

Annually, each agency should submit to the Appropriations Committees its estimated amount of requested funds for consulting services.

With its 20 years of experience in the field, the GAO has attempted to deal with the problems in a constructive fashion. Although we don't necessarily agree with all of the GAO findings, we again note that the GAO has never recommended legislation like the proposed bill. In this same vein, we do not believe that the bill would be the most productive method to solve the cited problems. From our perspective, we believe the legislation would:

Astronomically increase paperwork without any attendant increase in administrative control.

Decrease management flexibility within the Federal establishment.

Create a data and reporting system of staggering dimensions without direct benefit of any sort.

I would like to call to your attention an article printed in the September 1980 issue of Government Executive on the subject of consultants (Appendix C, attached). The author, Thomas G. Cody is the former Executive of Equal Employment Opportunity Commission (EEOC) and subsequently Assistant Secretary for Administration, Housing and Urban Development (HUD) under President Ford.

Mr. Cody correctly points out that the biggest problem with the Government's use of consultants is that they do not know how to properly use them. He states that "consultants have never been popular figures because they represent the dual threat of independent opinion and potential change".

He also points out the problem inherent in bills like the one we are addressing today, the layer cake solution. I'm sure even he will be amazed at the number of layers in this cake—36. Incidentally, he also mentions that the GAO, itself a consultative agency of the Congress, produced 1,168 reports in 1970 with a budget of $70 million but only 893 reports in 1979 for a budget of $186 million. The horror stories abound. And, this bill has the markings of another—rather than letting sunshine in, it would create a nightmare.

I don't know if you have examined the tasking requirements in the bill, but they are awesome. There are 36 specific actions required, should this bill become law. Seventeen of them must be performed for each and every contract let by the Federal Government which comes under the scope of this Act.

And that is my first problem—the definition of just how broadly this Act is written. When I see the definitions in Section 201 of "contractor" and "contract" to include any procurement of goods or services I am concerned. We have encountered this language in proposed legislation in the past, designed to limit consultants and yet broad enough to cover all procurement by the Government. What is the term "goods" doing in a consultant reform act? Unless that word is removed, I must object in total to the purpose and thrust of this bill. Consultants do not produce goods.

If you correct the scope of this bill to apply only to services, you then have 17 individual reports, statements, evaluations, decisions, clarifications, etc. to be made for every contract let and for every contract modification in excess of $50,000 and almost that many actions for contracts of $10,000. Mr. Chairman, the mind boggles at the thought of the millions, perhaps hundreds of millions of reports that this bill would generate annually.

Who will read them all? Why ?

This is for all contracts, where nothing wrong is discovered. Then there are the additional reports required in the event a conflict of interest is found. And the three optional responses by contractors. And then the 16 overall reports, estimates, statements and actions to be taken by Government agencies on an annual or quarterly or periodic basis.

Mr. Chairman, you would have to build the largest data system in the world to generate all of these reports and keep track of them. The consulting firm that gets this job will dominate the field. If you try to do it in-house the size of the work force required cannot be estimated. Can you envision delivering hundreds of thousands of reports, perhaps millions, every workday? You see, there are a lot of service contracts and modifications in the Federal procurement system. But to generate some 20 separate actions for each contract and modification is terrifying. Maybe one, or two, but not 20. I think you will find that it would take a long time to absorb all that data.

I might add, Mr. Chairman, that this bill flies in the face of every announced goal of this Administration to reduce paperwork and to reduce the size of the federal work force. And, to no purpose. Nothing will be achieved or prevented. Millions of actions will be taken in one small segment of the procurement process and piles of reports will be written but not one remiss consultant or contracting official will have anything happen to him as a result of all this activity.

If you could accomplish all these reports, statements and estimates at no cost in time or money they still would not do a single thing. Before any further serious thought is given to this bill, I urge you to have a cost analysis made to determine just what it would cost us. I know the workers represented by COCO don't want their tax money being spent this way.

Rather than create an incredible reporting mechanism, I would like to suggest another approach, Mr. Chairman. As Senator Pryor so accurately stated when introducing this bill "another layer of regulatory prohibitions was not the answer . . . the problem is not the absence of rules, but the failure to honor them". I don't believe that layering a fantastic reporting requirement on the Executive Branch will do anything worthwhile. Rather, requiring the contracting personnel to carry out the laws and provisions they have sworn to uphold may be a more productive approach.

I am not talking of a vague concept, nor a particularly difficult task. Just what appears to be a new approach. Find out through your Congressional oversight and/or GAO role when an abuse actually occurred in the granting or employment of consultants. Then, what was done to correct this practice? What happened to the consultant? If a law was violated, was he punished? Has he been forbidden to repeat his offense?

And, what happened to the contracting official? The project technical monitor? Were they disciplined, or even removed from their official role? If not, why not?

This is where the problem lies—not that wrongdoing occurs, but that it is not corrected. Now I am not talking about the majority, or even a significant portion of consultants or contracting officials. The GAO found that only an extremely small number, about four-tenths of one percent of Government employees are involved in fraud. But that group has given rise to this hearing, and all the concern the press and other media have given to waste, fraud, and abuse in the Federal procurement system. The GAO also found that 30 percent of all waste, fraud, and abuse was caused by this group, as contrasted to less than 1 percent to private contractor employees.

Because, in any single case of waste, fraud, or abuse on a Government contract there is one or more responsible Government employee who has through neglect, incompetence or complicity permitted or caused the problem to occur. Focus your attention on this small group, the weak link in the chain, and you will be able to do immeasurable good for our country. This is the critical point in the whole system. A few bad apples can spoil the entire procurement process.

Now I am not excusing, condoning or otherwise exempting guilty consultants from their role in waste, fraud and abuse. But, here again, it is a very small number. And, by correcting the weakest link, the civil servants who are violating their oath and public trust, you can achieve some impressive results.

Find out explicit facts, Mr. Chairman. What really happened, not a lot of newspaper stories about vague, wild charges. Then find out what was done to prevent a reoccurrence. In every case, there will be someone who has violated his public trust. Clean up these rotten apples, and you will do the entire country a great service.

What we need, Mr. Chairman, is not more rules, but more discipline.

I appreciate this opportunity to express these views for the 25 associations I represent. I hope you will look into a positive approach to these problems, rather than one which at best will permit you to conduct a study involving millions of reports to find out what is happening.

Appendix A

COMMITTEE ON CONTRACTING OUT (COCO)

1911 Jefferson Davis Highway
Suite 1002
Arlington, Virginia 22202
(703) 920-7640

SUBSCRIBING ASSOCIATIONS — SEPTEMBER, 1981

AEROSPACE INDUSTRIES ASSOCIATION

* AMERICAN CONSULTING ENGINEERS COUNCIL

AMERICAN DEFENSE PREPAREDNESS ASSOCIATION

* AMERICAN ELECTRONICS ASSOCIATION

ASSOCIATED GENERAL CONTRACTORS OF AMERICA

* ASSOCIATION OF MEDIA PRODUCERS

* ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS

* BUILDING SERVICE CONTRACTORS ASSOCIATION INTERNATIONAL

* CONFERENCE OF AMERICAN SMALL BUSINESS ORGANIZATIONS

COUNCIL OF NATIONAL SECURITY COMPANIES, INC.

ELECTRONIC INDUSTRIES ASSOCIATION

HELICOPTER ASSOCIATION OF AMERICA

* INFORMATION INDUSTRY ASSOCIATION

* LEGISLATIVE COUNCIL FOR PHOTOGRAMMETRY

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE U. S., INC.

* NATIONAL ASSOCIATION OF SERVICE CONTRACTORS

* NATIONAL AUDIO-VISUAL ASSOCIATION, INC.

* NATIONAL COUNCIL OF PROFESSIONAL SERVICES FIRMS

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES

NATIONAL SECURITY INDUSTRIAL ASSOCIATION

* NATIONAL SMALL BUSINESS ASSOCIATION/
NATIONAL SMALL BUSINESS LEGISLATIVE COUNCIL

NATIONAL TOOL & DIE ASSOCIATION

* NATIONAL UTILITY CONTRACTORS ASSOCIATION

* PRINTING INDUSTRIES OF AMERICA, INC.

* TEXTILE RENTAL SERVICES ASSOCIATION OF AMERICA

* EXCLUSIVELY OR PREDOMINANTLY SMALL BUSINESS INTERESTS

APPENDIX B

II

97TH CONGRESS
1ST SESSION

S. J. RES. 93

To clarify and reaffirm that it is the basic policy of the Government of the United States to rely on the competitive private enterprise system to provide needed goods and services.

IN THE SENATE OF THE UNITED STATES

JUNE 22 (legislative day, JUNE 1), 1981

Mr. HAYAKAWA (for himself, Mr. HATCH, and Mr. NICKLES) introduced the following joint resolution; which was read twice and referred to the Committee on Governmental Affairs

---

JOINT RESOLUTION

To clarify and reaffirm that it is the basic policy of the Government of the United States to rely on the competitive private enterprise system to provide needed goods and services.

Whereas it is the function of Government to establish Federal policies and manage Federal programs established by or pursuant to law; and

Whereas it is the function of the private enterprise system, which is the primary source of national economic strength, to provide goods and services needed in that endeavor; and

Whereas optimum efficiency, economy, and productivity can be achieved if the Government relies on competitive procure-

86-956 O - 82 - 5

ments from private enterprise for its needed goods and services; and

Whereas in a democratic free enterprise system, the Government should not compete with its citizens: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the general policy of the Government of the United States to rely on competitive private enterprise to supply the products and services it needs whenever competitive industry prices are available. This policy shall be administered by the Director, Office of Management and Budget in coordination with the Administrator, Office of Federal Procurement Policy.

Consulting: Government's Layer Cake Solution

By Thomas G. Cody
President
Management Consulting Group
Lester B. Knight & Associates, Inc.

HIGHLIGHTS

- *The current uproar over Government consultants reflects the broader struggle within our divided Government and an equally divided society.*
- *The real issue transcends consulting and touches the core of the Federal Government's pervasive management problems.*
- *And, basically, ineffective organizations and executives simply do not make good use of consultants.*

Thomas G. Cody is the former Executive Director of EEOC during the Nixon Administration and Assistant Secretary for Administration, HUD, in the Ford Administration.

Consultants have never been popular figures because they represent the dual threat of independent opinion and potential change. However, never before has there been an attack on consultants of the ferocity that's occurring now in Washington in the Congress and the Federal City's media.

Before fair-minded people decide whether the outpouring of consultant criticism is fully warranted, they should conduct two tests.

First, walk down one of the dimly-lit corridors of Commerce or HUD or South Agriculture. Tides of public employees, bearing papers, flow from place to place. In quiet offices off the busy corridors, the day's endless meetings are in progress. In other offices, animated conversations indicate non-work related subjects are being discussed.

Despite massive Federal investment in computer, telecommunication, and word processing, the Government Pony Express rides on. And those who suggest that consultants, when properly utilized, cannot let some light into these dark corridors and help infuse a sense of urgency and result in this tide of public employees either do not understand government operations, or do not understand consulting, or they have other motives which have nothing to do with understanding. Proper utilization is the key phrase, and there's the rub. . . with consultants and nearly everything else the Federal Government does or buys.

The second test is to try to relate the attack on consultants to the broader public environment. There are certainly problems in Federal Government selection and utilization of consultants, starting with the Government's inability to define the service, and the fact that self-branded consultants flourish in the Nation's Capitol who probably couldn't get a job under that label in another city.

However, those are symptoms, not causes. The underlying issues transcend consulting and touch the core of the Federal Government's pervasive management problems. The core issues, of which the consultant controversy is just one more manifestation, are:

- **Control**—In an era when Congress is determined to exercise "micro-management" responsibility over every aspect of Executive Branch activity, consultants are more difficult to control than bureaucrats, and they are thus caught in a struggle between "closed-shop" and "open-shop" forces.
- **Cost**—With Government running on a leaner mixture, expenditures for consulting services (over $9 billion according to the *Washington Post's* recent sensational expose; or about $1 billion under more rigorous definitions and somewhat more realistic estimates) ought to be challenged. The Government's ability to measure value received for dollars invested leaves something to be desired in this as in other areas.
- **Commitment**—This is the tough question of whether consultants are committed to the same public policy goals as civil servants, whether they can be held similarly accountable, or if they are not fatally disabled by conflict-of-interest, disclosure limitations, and the harsh embrace of Washington's "Iron Triangle."
- **Competence**—To warrant their cost and demonstrate professional commitment to service of the public interest, consultants should offer clearly outstanding competence. The problem is when that competence is program-specific, the revolving-door spectre is raised with all its conflict-of-interest potential; and when the required competence is general, Federal Government procurement practices not only do not measure it, . . . but may actually discourage it.

What all of this shows is that the Government consultant controversy simply reflects the broader struggle within our divided Government and equally-divided society. While various factions attempt to assert control, their estimates of cost vary; the principles to be committed to are partisan and shifting; and the determination of competence to address complex public policy and operational issues is too often shallow, specious, and carried out by relatively low level Federal personnel.

Is it possible to penetrate the issue of Government use or misuse of consultants beyond the current level of Media Hype, and get down to real facts? What, for example, does the GAO (the General Accounting Office, itself a consultative agency of the Congress, whose 1979 budget of $186 million produced 983 final reports, up from a budget of $70 million in 1970 when 1,168 reports *were* published) say on the subject?

GAO reports on consultants, of which there have been many, tend to mix indiscriminately three very different kinds of problems regarding consultants: (1) contracting failures; (2) general management deficiencies in Government; and (3) personnel/human resources problems related to the use of outside expertise.

- GAO reports on consultants allege that contracting practices are flakey, without adequate provisions for competition and control. Nowhere, however, does GAO demonstrate that Government contracting for consultant service is any worse than any other Federal procurement area. Many things and services purchased by the Federal Government cost more than they need

to; that isn't unique to consulting. The inference is that if the procurement rules were followed more scrupulously, the overall Federal result would be better, and that's nonsense.

• GAO alleges that many consultant projects are poorly planned and managed, and have a low probability of leading to successful implementation. The fair way to measure this is to compare consultant projects with those which are managed and staffed in-house. Are they any better, or are we face-to-face here with the core problem of project management incompetence? Let's take the $1 billion 1980 census project managed and staffed in-house and with a swarm of temporary patronage personnel. Is that a model of how things should be done?

• GAO alleges that many of the tasks jobbed out to consultants can and should be performed in-house by Federal employees. However, no comment is made on what is probably the greatest single cause of career and appointed Federal managers looking outside the establishment for assistance in getting things done—that is, despite the ballyhoo about civil service reform, the welter of personnel and labor relations regulations that continue to place rule and ritual ahead of responsibility and result, and diminish the motivation, productivity, and even competence of Federal manager and worker alike. If congress were really serious about putting Government consultants out of business or alternatively giving them something tough and worthwhile to work on, then it ought to focus its best efforts on this problem and do something to alleviate it.

Redirect Accountability

If the consultant problem has been accurately described here (hopefully, it's been shown to be more than that), then what can be done about it, recognizing the more basic problems which cause it are likely to be with us for *some* time?

At the least, we can seek to avoid, this time, the Federal Government's favorite layer cake solution to all problems. The layer cake solution works this way: When A doesn't do the job for which he or she is accountable, then B is designated to watch A; C looks over B's shoulder; D is appointed auditor; E becomes inspector general; and all the other letters of the alphabet for a task force to study what the problem is. The Consultant Reform Act of 1980 recently proposed by Senator Proxyer and Representative Harris is a classic layer cake in the making.

While avoiding actions that make the situation worse, there are also some positive steps that can be taken, for example:

• Government with Congressional and public support can move in the direction of making Federal managers *more* accountable, rather than removing accountability through the layer cake routine. The Carter Administration's performance standards and merit pay incentives for senior executives and midlevel managers are an important step in the right direction. Those performance objectives, however, cannot just be MBO (Management by Objectives) rhetoric. They have to build in numbers and resource utilization responsibility. Once that's done, we can begin to look at cost comparables from one Federal agency to another for people, grade level, overtime, computers, space, travel, and, yes, for procurement of consultant services as well.

Proper Climate

• In implementing its personnel reforms, the Carter Administration is finding out what good private sector managers already know—that to make a new system or management approach work, the right environment has to be created. The right environment for greater managerial accountability in Government clearly is not there. It *can* be created though, and the techniques are ready at hand. Congress should study what large companies in this country, Japan, and Germany are doing with quality circles, worker councils, and similar programs. No large organization ever cried out *more* loudly for unleashing of participatory energy in this way, than does our beleaguered bureaucracy. And for those who care about openness in Government and the uncovering of fraud or waste, these approaches will do more good than armies of whistle-blowers and new legions of inspectors general and special prosecutors.

• In addition to using modern management techniques to create the climate for greater managerial accountability in Government, the White House and Congress have to *face up to* another unpleasant reality. That is, the concept of accountability and performance measurement for career Government managers cannot be sold as long as the people at the top of the organization (that is, political executives) cop out and are seen by their organizations as being accountable for little other than going along. This problem can be solved if the Federal Government executive's accountability is defined as extending downward to the organization as well as up to the elected official, and ultimately to the voting public.

• Of course, public expenditures for consultant services should be recorded and reported as a part of overall management accountability. If the Federal Government got its own management house in order and created the right climate for managerial accountability, this requirement would go down a lot better than it has since President Carter's now-famous May 1977 memorandum about excessive use of consultants issued at a time when Bert Lance was talking about consulting "rip-off artists."

• It might be useful for congressmen or their executive staff to spend some time themselves in those long dark corridors of the Executive Branch, not looking for exposes, but gaining understanding of how things actually work or do not work.

• Finally, more emphasis should be placed on quality and professionalism in those consulting services that are necessarily procured by Government. Present practices are more appropriate for commodities or spare parts than for professional consultant services, and the constant inference that prior knowledge and personal relationships in this context are necessarily bad is naive.

Expecting to develop an effective professional service relationship by means of an arms-length exchange of stereotyped paragraphs (one set in the RFP and the echoing refrain in the proposal itself) is worse still.

Responsible Resolution

Unlike Richard Milhous Nixon, politicians and the press *will* have consultants to Government to kick around for years to come. Consultants who can't stand the heat or have anything in their backgrounds which won't withstand scrutiny should get out of the public kitchen.

While the torrent of criticism discomfits professional management consultants, most of us hope it will continue all the way to a responsible conclusion, because the conclusion is certain to be that effective organizations and competent executives in the public as well as the private sector *do* make good use of outside consultants, while ineffective organizations and incompetent executives do not.

So, by chewing on the husk long enough, Congress and others are ultimately going to bite down on the important kernel in the matter, and that is that we as a country face a growing crisis of Federal organizational and managerial ineffectiveness. It is that central problem which casts a lengthening shadow on consultants and all others who play a role in the way the Federal Government attempts to conduct its business.

Senator DANFORTH. Ms. Henderson?

TESTIMONY OF LAURA HENDERSON, MEMBER, BOARD OF DIRECTORS, NATIONAL COUNCIL OF PROFESSIONAL SERVICES FIRMS, ACCOMPANIED BY HARVEY KUSHNER, ALSO MEMBER, BOARD OF DIRECTORS

Ms. HENDERSON. Mr. Chairman, Senator Pryor, staff, thank you for asking us to appear this morning to share with you the views of the National Council of Professional Services Firms regarding the proposed Consultant Reform and Disclosure Act of 1981.

I am Laura Henderson, president of Prospect Associates, and I am a member of the board of directors of the council.

I am accompanied by Harvey Kushner, president of ORI, Inc., who is also a member of the council's board of directors.

The National Council of Professional Services Firms was formed in 1970 to actively promote improvements in the acquisition and management of services by the Federal Government. Representing over 200 companies and 6 associations, we believe that the council is representative of the diversity of our industry. We have large companies and small companies, businesses owned by women and minorities, and firms that specialize in engineering, systems analysis, human services, data processing, laboratory services, and a host of other areas.

A very rough estimate is that about 25,000 firms across the United States could be described as professional services firms, and about 95 percent of them are small businesses.

In 1978, the Committee on Federal Contracting Practices was formed as an outgrowth of the council activities and work by nonmember contractors who chiefly provide services to the civilian agencies.

The purpose was to focus increased efforts to improve the integrity, procedures, and cost-effectiveness of Government contracting in the nondefense area. The members of the Committee on Federal Contracting Practices also represent large and small businesses, minority and women-owned businesses and, in addition, nonprofit organizations.

NCPSF and the Committee on Federal Contracting Practices have worked closely with the executive branch and the Congress to formulate positive improvements in the procurement system.

With that brief introduction, let me summarize our position on the Federal use of private sector professional services and suggest specific areas in which S. 719 can be improved to the benefit of both industry and Government.

You have a copy of our detailed statement regarding the bill which I would request be included in its entirety in the record, so I will simply highlight the key points.

Senator DANFORTH. Without objection, a copy of your full statement will be made a part of the record of this hearing.

Ms. HENDERSON. First, we share a common objective with the committee—to assure that the Government receives quality work at reasonable prices when it relies on private contractors.

We are deeply concerned whenever we hear of examples of fraud, abuse, waste, and conflict of interest. Insofar as S. 719 is directed to better disclosure of Federal contracting practices, we are in agreement with that goal.

We have another deeply felt concern which arises from a number of interrelated occurrences. The Federal Government is experiencing an unprecedented exodus of its most highly qualified and motivated personnel. The brain drain from the Federal service substantially decreases the Government's capability of providing the factual and analytical support for Federal programs.

At the same time, tax and budget reductions require that public needs be met as economically as possible. Yet, when efficient use of the private sector is experienced and expertise would seem crucial to effective government, the ability of agencies to draw upon private sector resources is being increasingly reduced.

It is disheartening for us to see that at a time when Government and the private sector should be working most closely together, working as a team to try to solve the economic problems facing us, we are instead working as adversaries. This adversarial environment particularly surrounds the use of consulting and related services.

Personally, I have been in consulting for over 8 years, and I have been proud of the contribution my colleagues and I have made to the Government. Yet today we face an atmosphere where it is assumed by many Government employees that they must constantly be on guard against "Beltway Bandits." Regulation is so complex that I must hire outside specialists to assist me in negotiations. Contract changes, which should only take a day or two, now take months, because contract officers feel that they are being watched.

Good judgment is no longer the basis of decision. The approach is to go by the book even if it is not in the interests of the Government to do so.

Of course, the current maze of procurement laws and regulations, and the accompanying adversarial atmosphere, results from concern over fraud, abuse, and waste.

Fortunately, fraud is not as rampant in contracting as one would believe based on the attention it receives. The recent GAO study, which was discussed earlier, shows that less than 1 percent of the fraud cases that were investigated by Federal agencies were found in procurement and disposal of surplus property.

We believe that abuse and waste in all contracting activities can and must be controlled, but this goal should be achieved through managerial, not legislative, action. OMB efforts through OMB circular A–120 approved agency management control systems required by the July 1980 OMB memorandum on consulting services. Year-end spending restrictions and other managerial efforts represent positive and needed improvement. They provide the flexibility to reduce waste without escalating the cost of Government procurement.

Fraud in Federal contracts appears to be relatively infrequent, and the current hotlines and other efforts by the Reagan administration are directed to reducing the incidence of fraud even further.

We strongly support efforts to eliminate fraud in any Government activities and encourage strong penalties for individuals convicted of fraud.

In this time of austerity, we believe that the Federal Government must rely on the private sector for goods and services. The inherent efficiencies in the private enterprise system must be used to make

economy, to bring economy to the expenditure of appropriations. To make efficient use of private sector resources, procurement systems must be radically simplified.

The council believes that each legislative proposal in the procurement bill should be evaluated on two related grounds. One, does it encourage reliance on the private enterprise for the production of goods and services? And, two, does it simplify and streamline the procurement process? Using these criteria, it is clear that S. 719 requires substantial amendments. In particular, sections 205, 206, 207, and in one respect, section 208, would reduce private sector resources needed by the Government and thereby increase the cost of Federal programs.

In section 202, we agree that personal or professional services should be subject to the same publication requirements as other contracts. We do, however, question the purpose of adding an additional paperwork burden to acquisition offices by requiring modifications of $25,000 or more to be transmitted to the agency inspector general.

We support disclosure of information concerning the use of contractors listed in section 203 and would encourage expansion of the coverage to reports prepared under grants and cooperative agreements.

We believe that the definition of "report" in this section is too broad and would become a burden to contractors and agencies alike. We would recommend a definition of a "report" as:

the final written study, evaluation, analysis, manual, or other document developed for an agency by a contractor under a contract whose principal purpose was the procurement of such a report.

The council agrees with the concept of contractor evaluation required by section 204. However, we believe that the issue is quite complex and urge the subcommittee to consider modifications to this section to include provisions which will insure that the evaluations are fair, objective, and useful.

Any review process which is part of the procurement system must be designed to be free of the possibility of abuse. Our submitted testimony discusses specific concerns which should be considered in developing such a procedure.

We believe that a well-conceived contractor evaluation process would present an improvement to the acquisition system.

We have grave concerns about section 205, "Organizational Conflict of Interest." Irrespective of the particular provision, the council believes that it would be totally inappropriate to legislate in an area requiring subtle and complex determinations. This is particularly true in view of the imminent release of OFPP's Federal Acquisition Act, subpart 9.5, "Organizational Conflicts of Interest," which we support with modifications as described in our written testimony.

We believe that section 205 is unworkable, unfair, and will substantially reduce the ability of Federal agencies to obtain the highest quality professional services.

Among the most significant concerns to us are: one, the definition of "organizational conflict of interest" includes anticipated interests which directly or indirectly relate to work to be performed under a contract. Considering the penalties for failure to completely disclose relevant facts, and the ambiguity of the term "anticipated interest," this provision is unreasonable.

Two, the requirement of section 203 applies not only to cases of an organizational conflict of interest but to the appearance of a conflict of interest.

Senator DANFORTH. We do have your written statement in the record, so we will proceed with questions.

Ms. HENDERSON. Thank you very much.

Senator DANFORTH. Senator Pryor?

Senator PRYOR. First, Ms. Henderson, if I may—and we do appreciate your attending this morning—simply clarify the record, as we discussed earlier with the Office of Management and Budget. I wonder if it would be appropriate to ask you to comment on when you prepared your statement? Was it prior to the statement prepared, or the letter sent to Senator Roth in August 1981, relative to the conflicts-of-interest position that your association took and the identical position taken by the Office of Management and Budget, that you maybe discussed when you prepared this statement?

Ms. HENDERSON. The statement was prepared by legal counsel in the past few weeks.

Senator PRYOR. In the past several weeks?

Ms. HENDERSON. Right.

Senator PRYOR. That is your position. The statement that we have, on page 8, I believe, of your testimony, which is the identical, verbatim statement of the position of the Office of Management and Budget—could you help to clear the air on this and tell the committee when this particular statement or this position was prepared?

Ms. HENDERSON. My understanding is that in April of last year, shortly after the bill was released, legal counsel to the council—the National Council of Professional Services Firms—provided to the membership of the council—we have a legal counsel who responded to the bill and that was disseminated to several hundred people, the members of our council, as his reaction to the bill. That was done in April.

Senator PRYOR. Were you surprised when you saw that OMB adopted verbatim your position?

Ms. HENDERSON. Well, I was surprised.

Senator PRYOR. Or flattered?

Ms. HENDERSON. Well, it certainly reflects on our sound judgment as to the problem.

Senator PRYOR. Don't you consider that somewhat strange, that the Office of Management and Budget would take your position verbatim?

Ms. HENDERSON. I think it is an excellent position. I think it is based in fact. Had they taken the entire report that we sent out in April, I would have been astounded. That they would concur with four or five paragraphs does not surprise me. I believe that Government and industry can work together to work out workable solutions that are good for both parties.

Senator PRYOR. I believe in Government and industry working together. I do not believe that the Office of Management and Budget, in their position, could work together so closely with a party or with a concern that may be in an adverse relationship, that that relationship may be so close as to preclude objectivity on the part of that particular agency, the Office of Management and Budget, in this instance.

Mr. KUSHNER. Senator, may I make one comment on that, please?

Senator PRYOR. Yes.

Mr. KUSHNER. I was involved back in April when we were first reviewing the bill; and when these early comments were developed by our counsel for the national council, copies of that material were distributed all over the city. We papered the city with our position papers, the research that was done, just as is done by other interest groups. There were discussions with people in the Office of Management and Budget and OFPP that occurred back in April about this subject matter, because at the same time they were developing their position for the submissions that they eventually had.

Senator PRYOR. Were these discussions solicited by OMB?

Mr. KUSHNER. Not at all. These were unsolicited. When we had opportunity——

Senator PRYOR. Proposals by [illegible] industry?

Mr. KUSHNER. Absolutely not. Absolutely not. They were solicited in the sense that we tried to talk to our Congressmen and our Senators as well. I know of no case where there was any working together by any of the people involved in the national council and the people in the office of OFPP. We provided this information to them and many other people in the city, especially of our own group; and I know that members of our group—the biggest problem in town is the Xerox machine—members of our group made many copies of this material with which most of us agreed and distributed as well.

We are happy that they did agree with some of the points that were made in our paper as we believe lots of other people agree. But the notion that there was collusion or we were supporting or working together to develop their position, I think, is completely untrue.

Senator PRYOR. Coincidental?

Mr. KUSHNER. Coincidental.

Senator PRYOR. Coincidental that they would adopt a verbatim report that you had made available for them?

Mr. KUSHNER. I think it says a good deal for the merits [illegible] position and for the intelligence of the people who read it.

Senator PRYOR. Do you think that's an independent [illegible] for OMB to take?

Mr. KUSHNER. I would hope that it was arrived at independently, yes.

Senator PRYOR. Just one or two more questions, Mr. Chairman. One comment with regard to Mr. Richardson's statement. Mr. Richardson, we appreciate your coming.

Let me say—and I have always said this throughout the whole episode of looking at consulting relationships with Government—I do believe in consultants. I want you to know that.

Mr. RICHARDSON. I'm sure you do, sir.

Senator PRYOR. I don't dislike consultants. I don't distrust consultants. But I think that the consultant relationship has been abused. I think we spend too many dollars for consultants. I am very fearful that too many decisions today are being made outside the Government that should be made inside the Government.

But, I just want to comment that you brought up the fact that GAO, or you characterized GAO as a detached source capable of providing invaluable advice which is objective and independent regarding the

use of consulting services and possible solutions to address this problem area. I would just like to remind you so that the record will reflect this that GAO has this morning come out in support of S. 719.

Mr. RICHARDSON. I heard them.

Senator PRYOR. Second, I would like to ask this question. Basically, I sort of get the drift that some of the witnesses this morning, including yourself, believe that Congress has no role, that we should stay out of this area and leave it up to the executive branch, leave it up to trust and faith that people are going to do right, that they are going to observe the do-right rule.

Mr. RICHARDSON. May I respond to that, sir?

Senator PRYOR. Yes.

Mr. RICHARDSON. No. I don't believe that any of the people feel that way. We think that Congress has an oversight responsibility. What we see— and I am speaking now from my point of view, the point of view of my associations—is a whole maze of rules and regulations, and so terribly often nobody pays any attention to them.

Senator PRYOR. That's exactly my point.

Mr. RICHARDSON. And nothing happens to them.

Senator PRYOR. We agree on something.

Mr. RICHARDSON. Go thou and do again somewhere else, you know.

Senator PRYOR. We agree on something, and my question is this—what has more effect—the circular by OMB, a regulation or rule by an agency downtown, or a statute passed by the U.S. Congress?

Mr. RICHARDSON. Well, sir, I don't really know how I would pick a favorite there, but I think if you are going to disobey one, you might disobey them all. And the problem, I think, is the paternalistic—what I consider a sort of paternalistic mythology that has grown up in the process that makes it almost impossible to fire somebody that works for—in industry, we have no problem. The guy ain't there tomorrow. And you've got appeals processes—it can take 5 years to fire some secretary.

Senator PRYOR. Well, this bill doesn't relate to—basically S. 719——

Mr. RICHARDSON. It does relate to your question though, sir.

Senator PRYOR. I share some of your frustrations in other arenas that we are challenged to look at and be responsible to. I also would like just to state that I believe in depoliticizing the procurement process. In fact, I think that's what this legislation is all about; I am trying to depoliticize it. I am trying to make certain that people will be given an equal right to compete. I am trying to make it certain in this legislation that we can put everyone on an equal footing, that we will have full and total disclosure, that the public and the taxpayers will have full knowledge of why a particular firm was hired, the reasons for their being hired, whether they were responsible or irresponsible. And basically this is a service that we are trying to perform for the taxpayer, and I wish we could get more of our colleagues involved in this issue because I think it is a dangerous, dangerous trend of more and more of the decisions and policies being established outside Government.

I started to say, Mr. Richardson, that I wish you would support our legislation, but I must say in all honesty, if you supported it in its present form, I would then know that it had not gone far enough. So,

even though we disagree on this, I want you to know that we will certainly protect your right to disagree and honor your representation of your clients and expect no less of you than to do that. We do disagree on the course that we should take, trying to bring under control a condition in our whole Federal system I think has been abused and is going to continue being abused unless the Congress acts and acts strongly and acts quickly.

Mr. RICHARDSON. Let me say this——

Senator DANFORTH. That's the way the Senate operates: Someone says, "I have this problem, and could you correct it by an amendment to a bill," and in some cases, "Here is the draft of the amendment." Do you think that the Senator who introduced such an amendment should disclose that this amendment has been prepared by Joe Blokes?

Mr. RICHARDSON. I think it might be worth hearing where it came from, yes, sir.

Senator DANFORTH. Do you agree with that, Ms. Henderson?

Ms. HENDERSON. It seems to me that it would be complex but I think it would be interesting.

Senator DANFORTH. Do you think that the fact that Joe Blokes actually, say, drafted an amendment and presented it to the Senator and the Senator looked at it and said, "Gee, this looks good to me. I agree with it." So the Senator offers the amendment—do you think that that means that the amendment is any less the Senator's thinking or the Senator is any less independent? Maybe we should disclose all the people we talk to on the theory that really they are constituents who are participating in decisions which we should be making in isolation.

Ms. HENDERSON. I think it is a good parallel to the situation we are facing. Quite often, we as contractors provide advice, opinions, to the Government. You hear only about the times they were taken and taken verbatim and not about the hundreds of times——

Senator DANFORTH. What if they are taken verbatim? What if it is taken absolutely 100 percent? Does that mean that the agency that is taking the position is somehow being corrupted?

Ms. HENDERSON. It doesn't at all. My experience, and the experience of other council members, is that it is generally objectively considered and the Government employee uses his own objectivity to determine whether it is applicable.

Senator DANFORTH. Do you think that consultant contracts should be put out for bid?

Ms. HENDERSON. They are.

Senator DANFORTH. Are they?

Ms. HENDERSON. The ones that I compete for are always competitive. I've never had a sole-source contract—and unfortunately—in the history of my company.

Mr. RICHARDSON. I think that my comment would be that I think that is true. I think the great bulk of them are competitive. It's when you get special expertise that it looks like an incestuous relationship—when there is only one place you can get it, maybe two.

Ms. HENDERSON. Also, the cost of preparing proposals is very substantial, and if they are seeking very specific expertise, that is only available one or two places.

Mr. RICHARDSON. And the last point which I would like to add is—if it is definable, you can get competition. If it is—many things that you want are not definable in specific enough terms that you can put a circle around it and go out in the marketplace for it, and it has to evolve as you find the state of the art developing.

Do you understand?

Senator DANFORTH. I guess so.

Mr. KUSHNER. Senator, could I make a comment on these things we have been talking about? It seems to me that most of us who have reviewed this bill and the previous bill and other bills, as we have talked about it, have really no objection with the underlying objectives of the legislation and of Congress in this case. We agree with all of that. Where the problems arise is when the bill is drafted and begins to get very specific about the procedures to be followed and how the remedies will be administered. It would seem to me if the bills were written in such a way that this underlying objective, the intent of the Congress, was made very clear—for example, in the conflict of interest issue, that what the Congress was mandating against was the abuses that you are concerned about in the conflict of interest and that stringent penalties were provided in the event of the abuse, and then the administrative procedures that are required to avoid that were left to the people that have to actually run the programs, manage the contracts, develop the contract procedures and contract law—we would have many less objections to that.

As an example, as a president of a company who has to, every time we sign a contract, take a legal position for my company, the language of your conflict of interest in this particular bill probably would make it almost impossible for me to sign many contracts. This business of appearance of conflict of interest or anticipated conflict of interest is something that I don't know how to cope with.

It will at least make a lot of money for lawyers because if I am required to sign—I am very concerned about the false statement requirements, the legal liabilities we undertake when we enter into contracting with the Government—if the kinds of things that are in this bill and other bills we have seen, such specific procedures to be followed, are put into being and the Government people that we deal with try to rigorously enforce that, we'll have a great deal of difficulty in entering into contracts with the Government.

It's those kinds of things that concern us. We think that the procedures have to be appropriate to the situations. They certainly should fulfill the intent of the Congress. But I think we miss the point of what the ultimate objective is when we start writing the detailed administrative procedures into law.

Senator DANFORTH. Let me just ask you about the conflict of interest. Your business is consulting; that is, giving people advice, right? Is that what you do?

Mr. KUSHNER. To some extent.

Mr. RICHARDSON. Some of us do.

Ms. HENDERSON. Yes.

Senator DANFORTH. I'm not sure what you do, but I thought that that was it.

Mr. KUSHNER. The services that are described in the bill go beyond consulting when you talk about management support services. Some of the work we do is in the process of managing data bases for

Government. That's not giving advice. That's providing services to Government.

Senator DANFORTH. I am just wondering how conflict of interest would, in fact, come into play in consulting. Let's suppose the case of a consultant—and suppose that you consult for, say, the Department of Energy, and also you consult for Mobil. Is that a conflict of interest?

Ms. HENDERSON. That's a very good question and that's one of our concerns with the bill.

Senator DANFORTH. If you were in the business of drilling oil, or producing energy, and the Government asked you and was paying for an objective view of some position, and you were in that business of actually doing it for profit, that would be one thing.

You know, if a lawyer is representing two sides of the same case, that would be clearly a conflict of interest—because basically what he is is he's an advocate, he's not just an adviser.

But is there—in your view, as professional consultants—is there a conflict of interest if you are consulting, say, for Mobil and the Department of Energy? Would that be a conflict of interest? Would you tell the Department of Energy—I mean, not you individually, but hypothetically—if you were a consultant, would you tell the Department of Energy to do something not in the interests of the Department of Energy, but in the interests of Mobil?

Ms. HENDERSON. What we feel is that the problem with the bill and other bills that we have seen or other provisions is that the Government does not define what it means by conflict of interest as it relates to a scope of work. You could have a contract with Mobil where you were doing something very different from what you were going to advise the Department of Energy on. That would not be a conflict of interest at all.

But in this legislation, you might have to report it as an appearance of a conflict of interest.

Senator PRYOR. May I ask one other question?

Senator DANFORTH. Certainly.

Senator PRYOR. Let me suggest to you another scenario. XYZ consulting firm had been hired by the Department of Defense to advise the Department of Defense, or the Army, to go forward with the XM–1 tank. XYZ consulting firm advises Defense, Army, "Go forward with the XM–1 tank; you need it. The Russians are going to get it; you don't have it."

The same XYZ consulting firm is also the consulting firm for the Defense contractor that ultimately receives the contract to build the XM–1 tank, without any disclosure.

Is that a conflict of interest?

Mr. KUSHNER. Well, I do the Defense work around here so let me answer that question.

Mr. RICHARDSON. Wait a minute. When is the contractor awarded his contract? I mean, does the Defense Department issue specifications based upon this guidance?

Senator PRYOR. Let's assume XYZ consulting firm was doing work for the Pentagon and the contractor.

Mr. RICHARDSON. And Chrysler at the same time?

Senator PRYOR. At the same time. I'm not saying this happened.

Mr. RICHARDSON. I understand.

Senator PRYOR. I am saying that it happens in some cases.

Mr. KUSHNER. I think the first premise addresses the first statement you made. My company has done—over 27 years of our business, most of our work has been with the Defense Department. We have participated—by providing studies, reports, whatever you want to call it—in many issues that have to do, eventually, with Defense procurements. Not once, in my entire experience, have we ever advised the Government to buy anything. What we have done is provided the background data, the analyses, and the material that helps the Government arrive at a decision as to whether or not to buy and what or how to buy. In those cases, I don't believe that we have a conflict of interest if we are providing some other service to a company that might eventually participate in that procurement program.

Senator DANFORTH. Clearly, under Senator Pryor's hypothetical, that would be a conflict of interest.

Ms. HENDERSON. It seems that it would be. We, as a council, support the conflict-of-interest regulation.

Mr. KUSHNER. We would absolutely agree that the company that writes the specifications for a contract ought to be barred, in most cases—I could imagine some unusual cases—from then bidding against those specifications to perform the work. Or a company that participates in developing the requirements and possibly the specifications should be barred from then building the system at the other end. That kind of conflict of interest, though, we believe is very well taken care of with the procedures already in use by the Government.

Senator PRYOR. I am intrigued by the unsolicited proposal. While I have you as an expert—you are a firm or represent firms that do business with the Pentagon—how do you go about deciding whether or not to submit an unsolicited proposal? Do you have people working for you that say, "This is something; they have some money over in this little part of the Pentagon, and we could submit a proposal and receive that contract without any problem"? Or, do you see the area that needs to be addressed and some good patriotic person in your firm says, "Gosh, in the name of America, I want to do a study on this and I am going to propose that we do it," and walk over to the Pentagon and say, "Look, here's what you need to have advice on and I am the person to advise you"? How does an unsolicited proposal work?

Mr. KUSHNER. Let me speak particularly to the Defense Department because they are probably the most aggressive at trying to communicate to the public—the public that participates in Defense business—what their requirements are. There are formal programs when agencies of the Defense Department will, in writing, in meetings, and in seminars, communicate to the industry establishment, which includes us, what the problems are that the Government has and what their requirements are for solutions to those problems.

Most of these sole-source proposals, these unsolicited proposals which result in sole-source contracts, I would believe, are in response to the advertising by the Government of the need to solve those problems. We are responding to needs that have been generated by the Government, not needs that we have invented and then tried somehow to coerce the Government into fulfilling.

Senator DANFORTH. Thank you. Thank you, everyone.

[The prepared statement of Ms. Henderson follows:]

STATEMENT

of

LAURA HENDERSON

on behalf of

THE NATIONAL COUNCIL OF PROFESSIONAL SERVICES FIRMS

before the

SUBCOMMITTEE ON FEDERAL EXPENDITURES,
RESEARCH AND RULES

of the

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

on

S. 719

THE PROPOSED "CONSULTANT REFORM AND
DISCLOSURE ACT OF 1981"

September 18, 1981

Mr. Chairman and Members of the Subcommittee, my name is Laura Henderson and I am appearing on behalf of the National Council of Professional Services Firms (NCPSF) and its Committee on Federal Contracting Practices to comment on S. 719, the proposed Consultant Reform and Disclosure Act of 1981. I serve on the Board of Directors of the Professional Services Council and I am President of Prospect Associates, Ltd. I am accompanied by Harvey Kushner, also a member of the Professional Services Council Board of Directors and President of ORI, Inc.

The National Council of Professional Services Firms (NCPSF), established in 1970, represents firms in the professional services industry, companies with capabilities in the areas of research and development, laboratory analysis and testing, data processing, evaluations and other technical support services, engineering, management studies and information services. NCPSF includes the following associations: American Council of Independent Laboratories, Inc., American Society of Agricultural Consultants, American Society of Consulting Planners, Association of Consulting Management Engineers, Inc., Association of Productivity Specialists, and the Professional Engineers in Private Practice/NSPE. Additionally, approximately 200 individual professional services firms are members.

For over 11 years NCPSF has actively promoted improvements in the acquisition and management of services by the Federal

government. In 1978, the Committee on Federal Contracting Practices was formed as an outgrowth of both NCPSF activities and work by non-member contractors who chiefly provide services to civilian agencies, in order to focus increased efforts to improve the integrity and cost effectiveness of government contracting. The members of the Committee on Federal Contracting Practices represent large and small businesses, minority- and women-owned businesses, and non-profit organizations. NCPSF and the Committee on Federal Contracting Practices have worked closely with the Executive Branch and the Congress to formulate positive improvements in the procurement system.

A panel of NCPSF representatives testified on August 20, 1980 before the Senate Committee on Governmental Affairs regarding S. 2880, the proposed "Consultant Reform Act of 1980," which was the model for S. 719. NCPSF provided extensive analyses and factual information for the hearing record at the request of the Committee. In a number of respects S. 719 reflects an adoption of recommendations by NCPSF and other interested parties, particularly in statements of policy and findings. However, S. 719 would impose a number of unwise and unmanageable burdens on contractors and agencies that were proposed in S. 2880, and some provisions were added which we believe will impede the effective and efficient acquisition of services for the Federal government.

86-956 O - 82 - 6

The diminished capacity of the Federal government to meet public needs -- resulting from an exodus of highly qualified employees and vastly reduced budgetary resources -- requires substantial changes in the procurement process. Appropriated funds must be spent as efficiently as possible. Administrative expenses should be minimized and Federal agencies should draw upon the efficiencies inherent in private sector production of goods and services. We believe that, in these times of austerity, each legislative proposal concerning procurement should be evaluated under two related criteria: 1) Will it deregulate and simplify the procurement process? and 2) Will it encourage reliance on private sector resources for the supply of goods and services? Under these criteria, S. 719, particularly sections 205, 206, 207 and, in part, section 208, requires substantial modification.

A number of the reporting and disclosure provisions of the bill represent excellent ideas. For example, with some modifications, the provisions concerning publication of notices in the Commerce Business Daily prior to procurement of professional services (§ 202), disclosure of information concerning contractor prepared reports on the reports (§ 203), and evaluation of contractor performances (§ 204) would be positive additions to the acquisition system. However, we question whether it makes sense to address improvements which should be applicable to the acquisition of all goods and services through grants, cooperative agreements and

contracts solely to the acquisition of consulting services, management and professional services, and special studies and analyses through contracts. Piecemeal legislation addressed only to consulting and related services is particularly inappropriate before the results of new management controls, such as those in OMB Circular A-120 and OMB Bulletin 80-13, can be evaluated. Also, we believe that reforms of broader application are necessary, and that the provisions of S. 719 should be considered in the context of more fundamental changes to the procurement system.

The following is a brief statement of our views on each section of S. 719, as well as a discussion of broader and, we believe, more important proposed improvements in Federal use of outside consultants and contractors.

I. Provisions of S. 719

Publication of Contracts (§202)

Current regulations require that advance notice of procurements for personal or professional services shall be published when "it is feasible and practicable and in the best interest of the Government." FPR § 1-1.1003-3(b). We see no compelling reason not to subject such contracts to the same publication requirements as other contracts, which is basically what section 202(a) provides. We do question the purpose of adding an additional paperwork burden to acquisition offices as set forth in section 202(b). That provision requires that written information concerning

all contract modifications of $25,000 or more be transmitted to the agency Inspector General.

Disclosure of Information Concerning the Use of Contractors (§ 203)

We support the disclosure of the information listed in section 203, and believe that the requirement should be expanded to include reports prepared under grants and cooperative agreements. However, the definition of "report" to which the disclosure provision applies is so broad that disclosure would become an imposing burden to contractors and agencies alike. Section 201(4) provides that the term "report" means:

> ... a written study, plan, evaluation, analysis, manual, or similar document, in draft or final form, which is prepared by a contractor pursuant to a contract with an agency and which is submitted --
>
> (A) to such agency, or
>
> (B) on behalf of such agency to any other agency of the Government,
>
> but does not mean a billing document, invoice, or other routine business transmittal made with respect to the contract.

The disclosure requirements of section 203 are appropriate for final, written reports which are the primary, if not the only, end product acquired through a contract. We recommend that the definition be revised as follows:

> The term "report" means a final, written study, plan, evaluation, analysis, manual, or other document developed for an agency by a contractor under a contract whose principal purpose was the procurement of such report.

Although the mandatory evaluations required by section 204 will increase administrative expenses and raise a number of complex issues, in concept they are an excellent idea. A number of modifications are necessary to insure that evaluations are fair, objective and useful. The system must be efficient and relatively free of the possibility for abuse. For example, section 204 provides agencies 120 days to prepare written evaluations, while contractors are given only 10 days to prepare a response. Fairness requires at least 30 days for contractors to investigate and draft responses for the contract record.

Agency officials often change during the course of contract performance, so that those receiving a report are often not as familiar with what was desired or encouraged by the agency, or are not as prepared or able to evaluate knowledgeably the contractor's performance. Also, agency officials may be angered by objective but critical evaluations of their programs and performance prepared by independent consulting organizations. Therefore, to assure a fair evaluation, we believe that contractors must have knowledge of the evaluation criteria at the time of contract award. Any contractor who feels aggrieved by the evaluation must be able to respond through an appeal to the head of the agency. Upon receipt of such appeal, the head of the agency should be required to refer the report submitted by the contractor and its evaluation of the performance of the contractor to a per-

formance review committee which would evaluate the performance of both the contractor and the government employee or employees who were responsible for the program administration of the contract. The contractor should be given a hearing and be provided the opportunity to submit such materials for the record as he may feel are needed to support his appeal. Based upon the findings and written report of such committee, the head of the agency should be empowered to modify the initial evaluation or substitute the report of the review committee therefor. With the addition of these or similar protections, section 204 would present an improvement to the acquisitions process.

Organizational Conflict of Interest (§ 205)

The organizational conflict of interest provisions contained in S. 2880 are repeated again in S. 719 with several significant additions. Irrespective of the particular provisions, NCPSF believes that it is wholly inappropriate to legislate in an area requiring subtle and complex determinations. This is particularly true in view of imminent release of Federal Acquisition Act Subpart 9.5 -- Organizational Conflicts of Interest. The FAR provision represents literally years of diligent study and effort. The OFPP proposal which was published in August 1, 1980 offered the potential for a sound Federal policy, and Federal agencies should be given the opportunity to implement the new regulation.

Section 205 of S. 719, "Organizational Conflict of Interest," is replete with unworkable requirements which

will substantially reduce the ability of Federal agencies to obtain the highest quality professional services. Among the most significant of these requirements are:

1. The definition of "organizational conflict of interest" includes "anticipated interests" which directly or indirectly relate to work to be performed under a contract. § 205(b)(1). In view of the serious penalties for failure to completely disclose relevant facts and the ambiguity of the term "anticipated interests," this provision is unreasonable.

2. The requirements of section 205 apply not only to cases of an organizational conflict of interest, but to the "appearance" of a conflict of interest. E.g., § 205(d), (e), (f) and (g). If an agency determines that no actual conflict exists, there is no reasonable basis for effectively debarring contractors from an award based on an "appearance."

3. If after contract award a conflict of interest arises, agencies must either terminate the contract or make public a complete statement of all relevant facts. § 205(g)(1). This requirement will cause either the public disclosure of often highly confidential business information or serious disruption of Federal programs.

4. Agencies are prohibited from waiving the conflict of interest strictures when determined to be in the interest of the Government unless a complete statement of the relevant facts is made public. §§ 205(f)(3), 203(7). Here again, the bill will cause public disclosure of proprietary business information or disruption of some Federal programs.

5. Contractors who are damaged by arbitrary, capricious or even fraudulent conflict of interest determinations may only claim compensation for work performed under a terminated contract. § 205(g)(2). This arbitrary and punitive measure has no relation to any of the governmental interests sought to be protected by the bill.

The organization conflict of interest provisions of S. 719 contains none of the excellent ideas set forth in OFPP's proposed FAR section. For example, the proposed

regulation encourages the exercise of common sense and good judgment; it cautions contracting officers not to create burdensome information requirements; it uses the phrase "avoid, neutralize, or mitigate potential conflicts," which implies a flexibility in approach; and it directs contracting officers to examine the nature and importance of relationships between contractors and their clients, as well as internal controls to avoid bias, before deciding that a potential conflict of interest exists.

NCPSF provided its views on the proposed FAR section to OFPP. We believe that in one important area the proposed regulations should be amended. There is no requirement or mechanism for disclosure by potential contractors of information useful in making conflict of interest determinations. The approach to disclosure in section 205 of the proposed bill, which places the burden on each firm to determine what actual or potential conflicts it may have is highly questionable. Information "relevant" to conflict of interest determinations is often difficult to identify. We strongly endorse a more workable and fairer approach under which each agency would specify in its request for proposals precisely what information it desires from potential contractors, and an explanation of why it believes such information is relevant to a conflict of interest determination concerning the contract. Broad requests for contractual information irrespective of how many years in the past the contracts were completed or irrespective of

whether the subject matter is related to the scope of work in the proposed contract can impose substantial burdens on potential contractors without advancing the public interest. Requiring an agency to analyze and explain the relevancy of the information requested will help to insure that requests are not unnecessarily broad. Additionally, firms which desire to simplify the disclosure process could make one comprehensive disclosure to an agency of their work for private and public clients in a functional area, and update the disclosure periodically or as appropriate.

NCPSF has long been interested in clarifying and improving regulations and policies governing organizational conflicts of interest in the Federal acquisition of goods and services. It has been our experience that the subject is complex, and that many competing considerations must be weighed and balanced in fashioning guidelines which best serve the public interest. In recent months, the subject of organizational conflicts of interest has received considerable attention by the Congress and the media. For the most part, the anecdotal accounts of conflicts of interest discussed have not included thorough factual inquiries into the particular conflict or potential for conflict. Broad generalizations in this complex and subtle area constitute a disservice to contractors and Federal agencies alike. We are deeply concerned that the current attention to organizational conflicts of interest has generated an adversarial relationship between Federal agencies and contractors, as well as a profound

lack of trust -- in the judgment, knowledge and dedication of Federal managers involved in the acquisition process and in the ethical standards and professional and business practices of the contracting community.

An adversarial environment encourages disputes and litigation. Unlike the proposed FAR section, S. 719 would further increase this adversarial environment and diminish the business cooperation essential for a successful acquisition system.

Budget Identification and Justification (§ 206)

The Reagan Administration has a number of efforts underway to insure that the Government obtains necessary goods and services in the most cost effective manner through rigorous and timely implementation of OMB Circular A-76. Most recently, in an April 8, 1981 Memorandum to the Heads of Executive Departments and Agencies and in separate letters to major procuring agencies, the Office of Management emphasized that OMB Circular A-76 is an essential tool for achieving the major Administration goal of maximizing the efficient expenditure of funds.

OMB Circular A-76 commits the Federal government to objective cost comparisons of providing goods and services in-house or by the private sector to assure cost effective acquisition of goods and services. We concur with the Reagan administration's views about the importance of OMB Circular A-76, although we disagree strongly with the cost comparisons

required by the circular and its failure to adequately define "governmental functions" which must be performed by Federal employees. OMB Circular A-76 will not work in its current form if agencies must make final decisions about which functions the private sector should perform at the time of budget preparation. Detailed cost comparisons require considerable time and effort, and should be performed within a reasonable time before the goods or services will be needed.

Moreover, the requirement in section 206 of S. 719 for detailed budget itemization of the amounts each agency intends to expend for procurement of services freezes a process that by definition must be dynamic if genuine economy, productivity and efficiency in government are to be realized. Preparation of budget requests are initiated by Federal agencies over a year before the beginning of the fiscal year for which the request is made. Thus, section 206 would require agencies to make decisions concerning their needs for consulting services, management and professional services, and special studies over two years before those services are acquired. The nature of professional services call for flexibility in their use. Effective management of governmental programs requires an ability to call for program evaluations, technical and analytical support for program decisions and other assistance when needed. Rapid responses to the launch of Sputnik, the recent energy crisis, hospital cost containment initiatives and a host of other public needs would have been severely hampered had the Federal

government been unable to call on private sector skills, knowledge and talent when those needs were first perceived.

A more serious problem stems from the fact that selection of consulting and related services as a specific category for budget requests will only direct congressional attention away from programs for which services are obtained. We are aware of no useful purpose for selecting professional services, as opposed to all other procured goods and services, for detailed itemization in budget proposals. Budget itemization will encourage increased micromanagement of program implementation by the Congress. Most Federal programs have a professional services component, such as systems engineering, evaluation, management studies, or laboratory testing and analysis. The programs themselves should be the prime focus of congressional attention. Budget itemization for professional services and appropriation reductions for those items impedes successful accomplishment of congressionally approved programs. An excellent example of this is the Omnibus Budget Reconciliation Act, which reduced FY 1982 appropriations available for professional services by $500 million, while imposing literally dozens of requirements for studies and analyses which require private sector professional services.

Finally, we question the need for section 206 in view of section 306 of the 1980 Supplemental Appropriations Act, which provides for detailed and comprehensive estimates of expenditures for consulting services in future budget justifications. While we are deeply troubled by the

inflexibility placed on agencies by that provision, we believe that the Congress should wait to see how workable that requirement is before instituting another.

Federal Procurement Data System (§ 207)

We are unable to discern any reason for classifying all contracts as either "for professional type services or for commercial and industrial type activities" when the Federal Procurement Data System already includes much more detailed and comprehensive information. The Product and Service Codes for the System provide for thirty-eight classifications of special studies and analyses (R500 series) and sixteen classifications of management and professional services (R400 series). More important, "professional type services" and "commercial and industrial type activities" are co-extensive categories. Many professional type services are currently subject to the contracting-out requirements of OMB Circular A-76 (commercial or industrial activities), and we believe that all should be. Attempting to distinguish between two overlapping categories will only confuse acquisition personnel and may impede implementation of OMB Circular A-76.

Public Availability (§ 208)

With one exception, we would not oppose the public disclosure of information set forth in section 208. The name and qualifications of key personnel in a contract are currently considered to be proprietary business information

and withheld from public disclosure by Federal agencies. E.g., C.A.C.I. Inc., 1 DOE ¶ 80,180 (1978); Sheldon Leon Bierman, 1 DOE ¶ 80,181 (1979); Data Technology Industries, 3 DOE ¶ 80,102 (1979). Section 208(b)(10(B) requires disclosure of such information, which will enable competitors to seek to hire key employees, particularly when specific expertise is needed. We opposed such disclosures in our testimony on S. 2880 last year, and continue to believe that release of key personnel information is unnecessary and contrary to sound public policy.

Section 208(a)(2) would require a written justification of the need for consulting services contracts. If this is not already a requirement for all contracts, it should be. All expenditures of public funds should be justified, and we recommend that section 208(a)(2) be expanded to address all Federal procurement contracts.

II. Needed Procurement Reforms

In our testimony on S. 2880 last year, we strongly recommended specific legislation to achieve basic improvements in Federal use of outside consultants and contractors. We believe that broad procurement reform legislation is more necessary today for two reasons.

First, the current Administration inherited a serious and increasing exodus of Federal employees, particularly highly trained and motivated technical experts necessary to provide support for governmental programs. This decline

in the capacity of Federal employees makes it crucial that Federal officials be able to draw upon the experience and expertise in the private sector as efficiently and economically as possible.

The second reason why broad reform is important now concerns the rigorous budget and tax reductions recently adopted by the Congress. Economies and efficiencies in government operations are essential. They require reliance on the private sector to the maximum extent possible and sound, sensible procurement policies.

The draft proposals by the Office of Federal Procurement Policy (OFPP) regarding the Federal Procurement System, which are to be submitted to the Congress next month, indicate that OFPP may not address many of the substantial changes necessary. For example, we understand that there is considerable reluctance on the part of OFPP to include provisions similar to S. 1131, the proposed "Delinquent Payments Act" introduced by you, Mr. Chairman, which we strongly support. In any event, congressional review and debate of the OFPP proposal will take considerable time.

We recommend that, in addition to the amendments necessary to S. 719, a number of provisions be included which address more important improvements in the Federal use of outside consultants and contractors. Very briefly, we propose enactment of legislation which would establish:

1. A strong national policy of reliance on the private sector for goods and services whenever competitive industry prices are available.

2. Requirements for public disclosure and prior notification of proposed sole source contracts.

3. Limitations on unnecessary and wasteful year end spending through minimum periods between solicitations and contract awards.

4. Improvement of the career development and training of the procurement workforce.

5. Removal of arbitrary contract restrictions and statutory profit limitations, and encouragement of the creative use of appropriate contract mechanisms.

6. Authorization of multiyear funding for contracts.

7. Realistic and uniform inflationary price guidelines for proposal purposes.

8. Interest payments on overdue contract payments.

9. Restrictions on the 8(a) subcontracting and small business set-aside programs to allow incumbent contractors to continue to compete for set-aside contracts.

10. Timely audits by one lead agency.

11. Eligibility of profit-making institutions for grants.

Many of these reforms are already embodied in bills which have been introduced during this session of Congress, or were proposed in S. 5 or other bills during the last Congress. Many are based upon extensive hearing records. Most recently, Senator Hayakawa introduced S. J. Res. 93, which would establish a strong national policy of reliance

on the private sector. His Small Business Subcommittee on Advocacy and the Future of Small Business has conducted hearings on government competition and compiled a disturbing record of the impact of governmental production of goods and services. We believe that congressional attention to S. 719 as currently drafted is misplaced. More important changes are necessary at this time, and we urge that the Congress address the broader procurement issues facing the Federal government.

III. Summary

The diminished capacity of the Federal government to meet public needs--resulting from the exodus of highly qualified employees and vastly reduced budgetary resources--requires substantial changes in the ways in which the government purchases goods and services. We believe that each legislative proposal should be evaluated on the extent to which it facilitates the use of private sector resources to meet public needs and deregulates the procurement process. Inappropriate and potentially destructive organizational conflict of interest requirements, budget provisions which remove needed Executive branch flexibility, mandatory disclosure of proprietary information, and other provisions of S. 719 clearly do not satisfy these criteria. In the context of broad reform legislation, some of the provisions in S. 719 would be positive contributions. However, we question the wisdom of expending congressional resources on piecemeal legislation which singles out consulting services for reforms

86-956 O - 82 - 7

which should be applicable to all procurements. For example, agencies should justify in writing the need for all contracts, grants and cooperative agreements, not just consulting service contracts. The results of all contracts, grants and cooperative agreements should be evaluated, not just consulting service contracts.

The Professional Services Council and its Committee on Federal Contracting Practices believe in openness in government and support many of the findings and policies set forth in S. 719. We do not believe that the bill is the best way to meet the goals outlined by those findings and policies.

Senator DANFORTH. That concludes the hearing. The subcommittee is adjourned.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned subject to the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

97TH CONGRESS
1ST SESSION

S. 719

To amend section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17 (legislative day, FEBRUARY 16), 1981

Mr. PRYOR (for himself, Mr. SASSER, Mr. EAGLETON, Mr. PERCY, Mr. LEVIN, Mr. COCHRAN, Mr. PROXMIRE, Mr. DECONCINI, Mr. WILLIAMS, Mr. BAUCUS, Mr. SIMPSON, Mr. BURDICK, and Mr. RIEGLE) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

---

A BILL

To amend section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Consultant Reform and Disclosure Act of 1981".

STATEMENT OF FINDINGS

SEC. 2. The Congress finds and declares that—

(1) Federal procurement officials have not consistently complied with the laws relating to procurement activities and regulations and management guidelines in awarding contracts for the procurement of consulting services, management and professional services, and special studies and analyses;

(2) procurement practices, insofar as they relate to the procurement of consulting services, management and professional services, and special studies and analyses, do not presently provide for (A) full and open competition, (B) the prevention of duplication or overlap among contracts, (C) adequate consideration of conflicts of interest, or (D) the public disclosure of the use and role of contractors who provide such services, studies, and analyses;

(3) information regarding the Federal Government's use of consulting services, management and professional services, and special studies and analyses is not maintained in a manner that results in helpful or meaningful information being available to the Congress, the executive branch, or the public;

(4) the competitive pressures of the free marketplace increase the likelihood that consulting services, management and professional services, and special studies and analyses will be provided at competitive prices;

(5) full and open competition in the Federal procurement process supports the basis of the free enterprise system while guaranteeing maximum return on Federal procurement expenditures;

(6) the costs of performing governmental functions are borne by the taxpayer regardless of whether the functions are performed in the private or public sector;

(7) the integrity of the governmental process, especially when consulting services, management and professional services, and special studies and analyses are used in the performance of governmental functions, requires full public disclosure of the use and role of contractors who perform such functions; and

(8) legislation and oversight is necessary to achieve the consistent policies and practices needed in Federal procurement of consulting services, management and professional services, and special studies and analyses.

STATEMENT OF POLICY

SEC. 3. It is the policy of the United States that—

(1) governmental policymaking and decisionmaking functions should be performed by accountable Federal officials;

(2) the procurement of consulting services, management and professional services, and special studies and analyses by contract should be in compliance with applicable laws and regulations; and

(3) governmental functions should be accomplished through the most economical means available while recognizing the inherently governmental nature of certain activities.

TITLE I—APPOINTMENTS

REVISION OF SECTION 3109 OF TITLE 5

SEC. 101. (a) Section 3109 of title 5, United States Code, is amended to read as follows:

"**§ 3109. Employment of individual experts and consultants**

"(a) For the purpose of this section—

"(1) 'agency' has the same meaning as in section 552(e) of this title;

"(2) 'appointed consultant' means an individual—

"(A) who has a high degree of knowledge, skill, or experience in a particular field, and

"(B) whose primary function is to serve an agency in an advisory capacity in that field,

rather than to perform or supervise an operating function of the agency; and

"(3) 'appointed expert' means an individual—

"(A) who has excellent qualifications and a high degree of attainment in a professional, scientific, technical, or other field,

"(B) who, because of such qualifications and attainment, is usually regarded as an authority, or as a practitioner of unusual competence and skill, by other individuals engaged in that field, and

"(C) whose primary function is to perform or supervise an operating function of an agency rather than to provide advisory services.

"(b) When authorized by an appropriation Act or other statute, the head of an agency may appoint and fix the pay of appointed experts and consultants for temporary (not in excess of one year) or intermittent services, without regard to—

"(1) the provisions of this title governing appointment in the competitive service; and

"(2) chapter 51 and subchapter III of chapter 53 of this title (relating to position classification and pay rates),

except that the rate of pay for any individual so appointed may not exceed the rate of basic pay payable for GS–18 unless otherwise specifically authorized by statute.

"(c) Positions in the Senior Executive Service may not be filled under the authority of subsection (b) of this section.

"(d) The Office of Personnel Management shall prescribe regulations governing the employment of appointed experts and consultants and the reporting requirements of this section, and may take such action as it considers appropriate to assure compliance with those regulations, including audit of individual cases, and, if necessary, suspension of the authority to appoint experts and consultants. Agencies shall comply with the requirements of the Office, including taking any corrective action the Office may direct.

"(e) Each agency shall report to the Office of Personnel Management on a periodic basis with respect to—

"(1) the number of days each appointed expert or appointed consultant employed by the agency during the period was so employed, and

"(2) the total amount paid by the agency to each appointed expert and appointed consultant for such work during the period.

"(f) The head of any agency with statutory authority to appoint experts and consultants without regard to the provisions of this section shall, to the extent practicable and in

keeping with the provisions of such authority, appoint such experts and consultants in a manner consistent with the provisions of this section.

"(g) The head of each agency shall establish procedures for the review and approval of—

"(1) any determination relating to the need for the services of an appointed expert or appointed consultant under this section; and

"(2) the appointment of each appointed expert or appointed consultant.".

(b) The table of sections at the beginning of chapter 31 of title 5, United States Code, is amended by striking out the item relating to section 3109 and inserting in lieu thereof the following new item:

"3109. Employment of individual experts and consultants.".

EFFECTIVE DATE

SEC. 102. The amendments made by this title shall take effect one hundred and eighty days after the date of enactment of this Act.

TITLE II—CONTRACTS

DEFINITIONS

SEC. 201. For purposes of this title:

(1) The term "agency" has the same meaning as in section 552(e) of title 5, United States Code.

(2) The term "contract" means (A) any agreement, including any amendment to or modification of an agreement, between the Government and a contractor for the procurement of goods and services, or (B) any letter authorizing a contractor to provide goods or services to the United States prior to a specification of the compensation for the provision of such goods or services.

(3) The term "contractor" means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, including consultants and organizations thereof, which is a party to a contract with the Government.

(4) The term "report" means a written study, plan, evaluation, analysis, manual, or similar document, in draft or final form, which is prepared by a contractor pursuant to a contract with an agency and which is submitted—

(A) to such agency, or

(B) on behalf of such agency to any other agency of the Government,

but does not mean a billing document, invoice, or other routine business transmittal made with respect to the contract.

(5) The term "consulting services" means advisory services with respect to agency administration and management or agency program management.

(6) The term "management and professional services" means professional services related to management and control of programs, including—

(A) management data collection services;

(B) policy review and development services;

(C) program evaluation services;

(D) program management support services;

(E) program review and development services;

(F) systems engineering services; and

(G) other management and professional services of a similar nature which are not related to any specific program.

(7) The term "special study or analysis" means any nonrecurring examination of a subject which—

(A) is undertaken to provide greater understanding of relevant issues and alternatives regarding organizations, policies, procedures, systems, programs, and resources; and

(B) leads to conclusions or recommendations with respect to planning, programing, budgeting, decisionmaking, or policy development.

Such term includes—

(i) any study initiated by or for the program management office;

(ii) a cost benefit analysis, a data analysis (other than a scientific analysis), an economic study or analysis, an environmental assessment or impact study, a feasibility study which does not relate to construction, a legal or litigation study, a legislative study, a regulatory study, or a socioeconomic study;

(iii) a geological study, a natural resources study, a scientific data study, a soil study, a water quality study, a wildlife study, or a general health study; or

(iv) any similar special study or analysis.

PUBLICATION OF CONTRACTS

SEC. 202. (a) Notwithstanding any other provision of law, as soon as an agency completes preparation of a procurement request for consulting services, management and professional services, or a special study or analysis which the agency estimates will result in the award of a contract in excess of $10,000, the agency shall transmit to the Secretary of Commerce a written notice describing such contract. The Secretary of Commerce shall publish each notice received pursuant to this subsection in the publication "Commerce Business Daily" published by the Department of Commerce. An agency is not required to transmit to the Secretary of Commerce a notice with respect to any contract—

(1) for which a national security classification has been lawfully made relative to the contract or the terms therein; or

(2) which is awarded due to such an unusual and compelling emergency that the Government would be seriously injured if prior notice of the contract were required to be published.

(b) Whenever an agency modifies a contract for consulting services, management and professional services, or a special study or analysis, and in the modification of such contract increases the amount of the contract award by at least $25,000, the agency shall transmit to the Inspector General of such agency or comparable official, or in the case of an agency which does not have an Inspector General or comparable official, the head of the agency or his designee, a written notice describing—

(1) the original contract;

(2) the modification being made; and

(3) the justification for the modification.

DISCLOSURE OF INFORMATION CONCERNING THE USE OF CONTRACTORS

SEC. 203. Each report prepared by a contractor pursuant to a contract for consulting services, management and professional services, or a special study or analysis, and each report prepared by an agency which is substantially derived

from or includes substantial portions of any such report, shall include a statement disclosing—

(1) the name and business address of the contractor who prepared or contributed to the report;

(2) the total amount of the contract;

(3) whether the contract was awarded through competitive or noncompetitive procedures;

(4) the name of the office which or employee who authorized the award of the contract;

(5) in any case in which a contractor uses a subcontractor to prepare any portion of a report for an agency, the name and business address of the subcontractor and the amount paid to the subcontractor for the work;

(6) the names of all employees of the contractor, and any subcontractor, who substantially contributed to the report; and

(7) in any case in which an organizational conflict of interest has been determined under section 205 to exist with respect to the contract, the facts and circumstances of the conflict of interest.

CONTRACT EVALUATION

SEC. 204. (a) Within one hundred and twenty days after the completion of any contract for consulting services, management and professional services, or a special study or anal-

ysis, the total amount of which is in excess of $50,000, the agency shall prepare a written evaluation of the contract performance. The evaluation shall include a summary of the performance of the contractor under the contract, including—

(1) the performance of the contractor, based upon the terms and specifications included in the contract; and

(2) any deviation by the contractor from the provisions of the contract originally awarded with respect to cost and time for completion of the contract and a statement of the reasons for any such deviation.

(b) The agency shall include the evaluation required by subsection (a) in the records maintained by the agency regarding the contract and shall maintain a copy of the evaluation in a central location within the agency.

(c) A written copy of any evaluation made under this section shall be transmitted to the contractor concerned together with a notice stating that the contractor may, within ten days after receipt of such copy, transmit comments to the agency concerning such evaluation. Any such comments shall be included in the evaluation as a supplement.

ORGANIZATIONAL CONFLICT OF INTEREST

SEC. 205. (a) Beginning on the effective date of this title and ending three years after such date, this section applies to the award of contracts by the Department of Energy, the

Department of Transportation, and the Environmental Protection Agency.

(b) For purposes of this section:

(1) The term "organizational conflict of interest" means any relationship or situation in which an offeror or contractor has past, present, or anticipated interests that either directly, or indirectly through a client relationship, relate to work to be performed under a contract for consulting services, management and professional services, or a special study or analysis, and which—

(A) may diminish the capacity of the offeror or contractor to give impartial, technically sound, and objective assistance and advice; or

(B) may result in an unfair competitive advantage to the offeror or contractor;

but such term does not include the normal flow of benefits from the performance of the contract.

(2) The terms "offeror" and "contractor" include—

(A) a chief executive or director of the offeror or contractor, to the extent that such executive or director will or does become substantially involved in the performance of a contract entered into with an agency; and

(B) a consultant or subcontractor proposed to be used by the offeror or contractor in the performance of

a contract entered into with an agency in any case in which such consultant or subcontractor may be performing services similar to the services provided by the offeror or contractor.

(c)(1) Whenever an offeror submits to any agency a proposal for a contract for consulting services, management and professional services, or a special study or analysis, the offeror shall include with such proposal—

(A) a statement which discloses all relevant facts relating to an existing or potential organizational conflict of interest concerning the contract; or

(B) a statement certifying, to the best knowledge and belief of such offeror, that no relevant facts exist relating to such an existing or potential organizational conflict of interest.

(2) Any consultant or subcontractor which any such offeror proposes to use in the performance of a contract described in paragraph (1) shall also submit a statement containing the information required by paragraph (1) to the agency receiving the proposal.

(3) In any case in which a contract described in paragraph (1) has been entered into by an agency and a modification of the contract becomes necessary, the contractor and any consultant or subcontractor used by the offeror in the performance of the contract shall submit to the agency—

86-956 O - 82 - 8

(A) the same type of statement with respect to such modification as required by paragraph (1) with respect to a contract; or

(B) a revision of any statement submitted under paragraph (1) which relates to any potential organizational conflict of interest concerning such modification.

(4) Each contractor, consultant, and subcontractor which has submitted a statement under this subsection shall submit, on a timely basis, revisions of such statement as may be necessary to clearly and accurately reflect any changes in circumstances relating to an existing or potential organizational conflict of interest arising after the statement was made or last revised.

(d) The head of each agency to which this section applies shall establish or designate an office to administer the provisions of this section with respect to contract proposals and contracts of the agency. The head of each such office shall evaluate each statement received pursuant to subsection (c) to determine whether an organizational conflict of interest or the appearance of such a conflict exists with respect to the contract for which the statement is submitted. In making such evaluation, the head of such office shall—

(1) consider whether—

(A) the offeror, contractor, consultant, or subcontractor has conflicting roles or interests

which might bias the judgment of the offeror, contractor, consultant, or subcontractor concerning the work to be performed pursuant to the contract; or

(B) the offeror or contractor will have an unfair advantage in the performance of the contract; and

(2) pay particular attention to proposed contractual requirements which call for the provision of advice, evaluation, or other actions which will have a direct effect on future decisions of the agency relating to contracts, procurement, research and development programs, production, or regulatory activities.

(e) Whenever the head of an office established or designated under subsection (d) determines that an organizational conflict of interest or that the appearance of such a conflict exists with respect to a contract for consulting services, management and professional services, or a special study or analysis, or a proposal for such a contract, he shall transmit a notice of his determination to the offeror or contractor involved. Within 10 days after the receipt of such notice, the offeror or contractor may transmit written comments to the head of the office concerning the determination or may transmit such comments to the head of the agency with a request that the head of the agency review such determination.

Within thirty days after receiving such a request, the head of the agency shall review the determination of the head of the office and shall issue a written decision. In conducting such review, the head of the agency may request the offeror or contractor to provide additional information concerning the issues involved. The head of the agency shall transmit a copy of his decision under this subsection to the offeror or contractor and the head of the office.

(f) If, prior to the award of a contract for consulting services, management or professional services, or a special study or analysis, the head of the office determines that an organizational conflict of interest or the appearance of such a conflict exists with respect to the contract, and such determination is not reversed by the head of the agency—

(1) the agency shall disqualify the offeror from eligibility for award of the contract or, in the case of an organizational conflict of interest or the appearance of such a conflict involving a consultant or subcontractor proposed to be used by the offeror in the performance of the contract, shall prohibit the offeror from using the services of such consultant or subcontractor;

(2) the agency shall include in the contract awarded to the offeror such conditions as the agency determines would avoid an organizational conflict of interest

or the appearance of such a conflict involving such offeror or any consultant or subcontractor; or

(3) in any case in which the agency determines that—

(A) the facts and circumstances surrounding the contract necessitate immediate action; and

(B) the agency is unable to obtain the services to be performed pursuant to the contract from any other person other than the offeror, consultant, or subcontractor involved in the organizational conflict of interest or the appearance of such a conflict,

the agency may award the contract to the offeror if the agency includes in the records maintained by the agency on the contract, makes available to the public, and transmits to each committee of the Senate and the House of Representatives having legislative jurisdiction over the agency, a complete statement of the relevant facts disclosed by the offeror, consultant, or subcontractor pursuant to subsection (c), or otherwise known or made available to the agency.

(g)(1) If, after the agency has entered into a contract for consulting services, management and professional services, or a special study or analysis, the head of an office established or designated in the agency under subsection (d) deter-

mines that an organizational conflict of interest or the appearance of such a conflict exists with respect to the contract, and such determination is not reversed by the head of the agency, the agency shall—

(A) terminate the contract; or

(B) in any case in which termination is not in the best interest of the Government, modify the contract to the extent necessary to prevent or mitigate to the greatest extent possible the conflict or the appearance of the conflict and include in the records maintained by the agency on the contract, make available to the public, and transmit to each committee of the Senate and the House of Representatives having legislative jurisdiction over the agency, a complete statement of the relevant facts determined to exist regarding the offeror, consultant, or subcontractor.

(2)(A) Except as provided in subparagraph (B), a contractor who has entered into a contract with an agency for consulting services, management and professional services, or a special study or analysis, or a consultant or a subcontractor to any such contractor shall have no claim against the United States for damages as a result of an action of an agency under paragraph (1) (other than a claim specified pursuant to a convenience clause in the contract), but such a contractor, consultant, or subcontractor may have a claim

against the United States for compensation for work performed prior to such agency action.

(B) A contractor who has entered into a contract with an agency for consulting services, management and professional services, or a special study or analysis, or a consultant or a subcontractor to any such contractor shall have no claim for compensation for work performed prior to an agency action under paragraph (1) if it is determined that such contractor's, consultant's, or subcontractor's failure to completely disclose the relevant facts under subsection (b) precluded a determination of the existence of an organizational conflict of interest or the appearance of such a conflict involving such contractor, consultant, or subcontractor prior to the award of the contract.

(h) Two years after the effective date of this title, the Comptroller General of the United States, in conjunction with the Director of the Office of Management and Budget, shall commence an evaluation of the operations of the provisions of this section, and, within nine months after the commencement of such evaluation, shall prepare and transmit a report to the Congress concerning the result of such evaluation, including recommendations for the continuation, modification, or termination of such provisions.

BUDGET IDENTIFICATION AND JUSTIFICATION

SEC. 206. (a) The head of each agency shall include with the request for regular appropriations for each fiscal year submitted to the Director of the Office of Management and Budget pursuant to section 215 of the Budget and Accounting Act, 1921 (31 U.S.C. 23), an itemized statement of the amounts requested by the agency for procurement in such fiscal year. The statement shall identify such amounts according to the same subfunctional categories to be used by the President in the submission of the Budget for such fiscal year pursuant to section 201(a) of such Act (31 U.S.C. 11), and, within each such category, shall identify such amounts according to classifications for (1) procurement of consulting services, management and professional services, and special studies and analyses, and (2) all other procurement activities.

(b) The Budget transmitted by the President to the Congress for each fiscal year under section 201(a) of the Budget and Accounting Act, 1921 (31 U.S.C. 11) shall set forth separately, within each subfunctional category used in such Budget, requests for new budget authority for, and estimates of outlays by, each agency for (1) procurement of consulting services, management and professional services, and special studies and analyses, and (2) all other procurement activities.

(c)(1) By April 1 of the fiscal year preceding the fiscal year for which the Budget is submitted pursuant to section

201(a) of the Budget and Accounting Act, 1921, the head of each agency shall prepare and transmit to the Committees on Appropriations of the Senate and the House of Representatives an analysis of each request for new budget authority and of the estimates of outlays included in such Budget for such agency pursuant to subsection (b) of this section and a statement justifying the need for each such request and estimate.

(2) Within sixty days after the President transmits to the Congress a revision of any request or estimate included in the Budget for any fiscal year pursuant to subsection (b), the head of the agency affected by such revision shall prepare and transmit to the Congress a modification of the analysis and statement required by paragraph (1) which reflects the revision made by the President.

FEDERAL PROCUREMENT DATA SYSTEM

SEC. 207. (a) The Administrator for Federal Procurement Policy shall establish a data system for the collection and dissemination of information regarding all contracts entered into by each agency. The system shall classify every contract or contract modification for an amount in excess of $10,000 as either for professional type services or for commercial and industrial type activities, and shall include for each such contract or contract modification—

(1) the name of the agency awarding the contract;

(2) an identification number or other designation for the contract or modification, as the case may be;

(3) the name of the contracting office of the agency which awarded the contract;

(4) the name of the contractor;

(5) whether the contractor is a small business or a minority business;

(6) the date on which the contract award or the modification was made;

(7) the city, county, State, or country in which the work under the contract will be performed;

(8) a brief description of the work to be performed under the contract;

(9) the total dollars payable by the Government under the contract;

(10) the estimated completion date of the contract;

(11) whether the contract was awarded through competitive or noncompetitive procedures;

(12) the type of contract, such as a cost reimbursement contract or fixed price contract; and

(13) if applicable, the negotiation authority used to award the contract under the provisions of section 2304(a) of title 10, United States Code, or section 302(c) of the Federal Property and Administrative Services Act of 1949.

(b)(1) Consistent with otherwise applicable law, the Administrator for Federal Procurement Policy shall make information within the system available, on request, to the Congress, the various agencies, and the public.

(2) The Administrator for Federal Procurement Policy shall prepare and transmit to the Congress quarterly and annual reports regarding the information maintained on each agency within the system.

(c) Each agency shall provide such information to the Administrator for Federal Procurement Policy as may be necessary to assure that the data concerning the agency in the system and in the reports under subsection (b)(2) is current, accurate, and complete.

PUBLIC AVAILABILITY

SEC. 208. (a)(1) Each agency shall compile and make available to the public a list of all contracts entered into by the agency during the twelve-month period immediately preceding the month in which the list is prepared and a separate list of all contracts entered into by the agency for which performance has not been completed at the time of the preparation of such list. The lists shall be updated on a quarterly basis and shall include, for each such contract—

(A) the contract identification number assigned by the agency;

(B) the contractor's name;

(C) the date of award and the estimated completion date;

(D) the original and current amounts to be paid by the agency under the contract; and

(E) a brief description of the work to be performed.

(2) Every agency shall prepare and maintain a written statement justifying the need for each contract for consulting services, management and professional services, or a special study or analysis which is entered into by the agency. The statement shall include the name of the Government employee who authorized the award of the contract and the Government employee who is responsible for the administration of the contract.

(3) Each agency shall permit the public to inspect and make copies of the list prepared under paragraph (1) and the statements prepared under paragraph (2). The agency may make a reasonable charge for the costs of making such copies.

(b)(1) Except in any case in which the disclosure of a contract or any information therein is prohibited by law, and except in any case in which, for national security reasons, the terms of a contract are lawfully determined to be of a classified nature—

(A) all contracts shall be considered public information and shall be available to the public upon request; and

(B) the following information shall be available to the public for every contract for consulting services, management and professional services, or a special study or analysis:

(i) the name and qualifications of any personnel designated in the contract; and

(ii) the sole source justification if such contract was awarded on a sole source basis.

(2) Paragraph (1) does not require an agency to make technical proposals available to the public.

EXEMPTIONS

SEC. 209. Notwithstanding any other provision of this Act, contracts for consulting services, management and professional services, and special studies or analyses, and any data, reports, or other material pertaining thereto, which relate to sensitive foreign intelligence or foreign counterintelligence activities, which relate to sensitive law enforcement investigations, or which are classified under the national security classification system are exempt from the provisions of this title.

EFFECT ON OTHER LAW

SEC. 210. The provisions of this title shall supersede any statute enacted before the date of enactment of this Act to the extent such statute is inconsistent with the provisions of this title.

EFFECTIVE DATE

SEC. 211. The provisions of this title shall take effect one hundred and eighty days after the date of enactment of this Act.

U.S. SENATE,
Washington, D.C., September 18, 1981.

Hon. DAVID A. STOCKMAN,
Director, Office of Management and Budget, Executive Office Building, Washington, D.C.

DEAR MR. STOCKMAN: As you are no doubt aware, I have long been concerned that there exists between some agencies of the federal government and private contractors an almost "incestuous" relationship. Investigations of the Subcommittee on Civil Service and General Services coupled with reports of the General Accounting Office seem to indicate that in many cases outside consultants are actually making the policy to be carried out by the federal government. They prepare testimony, answer letters to Members of Congress and write annual reports to the Congress.

An incident which occurred in a hearing today of the Subcommittee on Federal Expenditures, Research and Rules which was holding hearings on my consultant reform bill (S. 719) seems to prove this concern is valid.

In August, OMB filed a letter with the Committee on Governmental Affairs stating its views on the bill. I think it has to be more than mere coincidence that included in this letter were paragraphs identical—almost verbatim—to paragraphs included in the testimony of Ms. Laura Henderson, the representative of the National Council of Professional Services Firms (consultants). These same paragraphs had been circulated by Ms. Henderson's firm to their membership in April of this year.

Quite frankly, Mr. Stockman, I am insulted by this "coincidence" and would like a full explanation of this situation. Whether the answer is that the consultants are now writing your agency's testimony, which has been a common occurrence in other federal agencies, or whether your agency is now writing testimony for consultants does not really matter.

There is either collusion between OMB and consultants or gross negligence on the part of your agency. This evidence strongly suggests one or the other.

I would greatly appreciate your prompt response to this letter.

Sincerely,

DAVID PRYOR.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., October 22, 1981.

Hon. DAVID PRYOR,
U.S. Senate,
Washington, D.C.

DEAR DAVID: In response to your letter of September 18, 1981, let me assure you that there is neither collusion between OMB and consultants, nor have consultants been hired to prepare congressional testimony for either me or members of my staff.

After reviewing information relevant to the incident you referenced, we found the following:

On April 7, 1981, at the request of Senator Roth, OMB initiated a review of S. 719 by requesting comments from various Government agencies.

On April 21, 1981, members of the staff of OMB's Office of Federal Procurement Policy received a copy of widely circulated comments on S. 719 prepared for the National Council of Professional Services Firms (NCPSF) by their counsel, who is a member of the Washington law firm of Chapman, Duff and Pau..

On June 3, 1981, the Office of Federal Procurement Policy provided OMB's Legislative Reference Division—a focal point for legislative matters—with written comments on S. 719. Those comments included, in part, an extract from the NCPSF's paper that addressed organizational conflicts of interest. The particular comments were not attributed to the source.

In preparing our response to Senator Roth, comments from other agencies and divisions within OMB were consolidated and reviewed. Our views on S. 719 were sent to Senator Roth on August 14, 1981. Neither those who consolidated nor those who reviewed the comments knew of the plagiarism.

As stated in the response to your question during the September 18 hearings on S. 719, OMB's testimony was prepared solely by Government personnel.

Although the plagiarism in this case is inexcusable, Public Law 96–83, the Office of Federal Procurement Policy Act, as amended, gives OFPP the authority to solicit "the viewpoints of interested parties in the development of procurement policies, regulations, procedures and forms." In developing balanced, government-wide procurement regulations and policies, all interested sources of information—private and government—are encouraged to provide OFPP with their views on issues of interest to them. Plagiarism, however, is not and will not be condoned in this Administration.

Finally, regardless of the source of the particular words included in our comments to Senator Roth on S. 719, they are consistent with our current thinking, were thoroughly reviewed, and stand on their merits.

Sincerely,

DAVID A. STOCKMAN,
Director.

STATEMENT OF SENATOR TED STEVENS

Mr. Chairman, the urgent necessity facing this Congress and this Administration to slow the rate of government growth makes fiscal accountability more important than ever before. For that reason, I am anxious to express my support for the important investigations which Senator Pryor has conducted into the proper use of consultants.

Consultant use can be a legitimate and economical way to perform some government tasks, and I would not like to see Congress unduly constrain agencies' ability to tap the talent available in the private sector when there is a genuine need to do so. However, GAO studies have shown that too often vague and ill-defined descriptions of work to be accomplished result in products which cannot be used. For example, this April, the GAO testified before a joint nearing of the Senate Subcommittee on Post Office, Civil Service, and General Services and the Human Resources Subcommittee of the House Post Office and Civil Service Committee that in their review of management support service contracts at the Department of Defense, they found that nearly 20 percent were of questionable or marginal use to that department. A similar GAO review of civilian agencies showed an even higher percentage. Even allowing for wide statistical error, those are alarming figures.

Mr. Chairman, it is clear to me from figures such as these that the proper use of consultants is a concern which we urgently need to address.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

1981 JUL 24 AM 10:44

JUL 22 1981

B-199499

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental
Affairs
United States Senate

Dear Mr. Chairman:

Your letter of April 7, 1981, requested our views on S. 719, 97th Congress, 1st Session, the proposed "Consultant Reform and Disclosure Act of 1981." This bill would, among other things

--amend section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants and

--provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses.

The General Accounting Office's (GAO) concern about the Government's use of consulting services is evidenced by over 30 audit reports we have issued on this subject during the last 20 years. These reports identified the need for almost every major Federal agency to better manage these services. Although we continue to believe that the proper use of consulting services is a legitimate and economical way to conduct Government operations, we see little evidence that agencies are acting administratively to correct abuses. Our recent report, "Government Earns Low Marks on Proper Use of Consultants," FPCD-80-48, June 5, 1980, concluded that many of the same problems that existed as far back as 1961 exist today. Normally, we do not support legislative remedies for problems that could be resolved administratively. However, since executive branch agencies, with few exceptions, have not acted administratively, we believe congressional action is necessary. Accordingly, we can support S. 719 if certain suggested changes are made.

As you know, we did not support the previous version of this bill introduced in the 96th Congress, S. 2880, partly because of our concern that it could unduly constrain agencies' ability to obtain valuable consulting expertise from the private sector. However, the current bill, S. 719, has incorporated

86-956 O - 82 - 9

most of the suggestions made during our testimony on S. 2880 before your committee on August 19, 1980. For the most part, S. 719 adequately balances the public's need for assurance that Federal funds for consulting services will be spent properly with the agencies' need to use these services, where appropriate, to carry out Federal programs. Our comments on specific sections follow the order they appear in title II of the bill.

Section 203

This section would require agencies to disclose certain information on each report prepared by a contractor and on agency reports which are substantially derived from or include substantial portions of contractors' reports. We believe the information required by the bill would be useful but would suggest that another disclosure provision be added to require a brief description of the work performed by the contractor (e.g., data collection, data analysis). We believe this information would help show the potential for contractor personnel to influence the report's conclusions and recommendations.

Section 204

This section would require a written agency evaluation of consulting and professional service contracts in excess of $50,000.

Our March 20, 1980, report on consulting service contracts supports the need for such evaluations. 1/ We believe it is critical for agencies to assess the quality and use made of consulting services, including an appropriate justification for failing to use the results of these services.

We reviewed 60 completed contracts and found that one-third were of questionable or marginal value to the agencies. Previous GAO studies, dating back to 1961, as well as the Commission on Government Procurement, have found that many Federal agencies do not, for various reasons, fully use reports prepared under Federal consulting service contracts. Accordingly, we would suggest that the scope of this section be expanded to include a requirement for agencies to evaluate the actions it took in response to any consultant's report containing recommendations to agency officials. If no action was taken on the recommendations, the reasons should be stated in the evaluation. Also, we believe the evaluations should be approved by an agency official at least two levels above that of the program manager responsible for monitoring the consultant's performance to help assure the objectivity and quality of the evaluations.

1/"Controls Over Consulting Service Contracts At Federal Agencies Need Tightening" (PSAD-80-35, Mar. 20, 1980).

B-199499

Section 205

This section would require, for a 3-year period after enactment, that all potential contractors with the Departments of Energy and Transportation and the Environmental Protection Agency disclose all relevant facts relating to an existing or potential organizational conflict of interest concerning proposed contracts. A designated office in each agency would then evaluate each statement submitted and determine whether an actual conflict or the appearance of a conflict existed and, if so, send written notification of that determination to the offeror. The offeror could then transmit additional information to the head of the agency with a request for review of the original determination. If the original determination is not reversed by the head of the agency, three options would be available: (1) disqualify the contractor from eligibility for award of the proposed contract, (2) award the contract with special contractual provisions to avoid conflicts, or (3) award the contract, if the needed services cannot be obtained elsewhere, but make the relevant facts and circumstances concerning the conflict available to the public and the congressional committees with legislative jurisdiction over the agency.

With one exception, we fully support this section of the bill. It is consistent with our August 1980 testimony that suggested the conflict-of-interest provision be tested at selected agencies for a period of time before applying it Government-wide. The exception concerns section 205(h) which would require GAO, in conjunction with the Director, Office of Management and Budget, to evaluate agencies' implementation of this section and report the results to the Congress with recommendations for continuing, modifying, or terminating the provisions of the section. This evaluation would be required to begin 2 years after the bill's enactment and the report issued within 9 months later.

As a general policy, we do not support legislative requirements for GAO audits or evaluations of a particular program. Under section 312(a) of the Budget and Accounting Act of 1921, as amended (31 U.S.C. 53), the Comptroller General has authority to investigate and report on "all matters relating to the receipt, disbursement, and application of public funds." Section 204(a) of the Legislative Reorganization Act of 1970, as amended (31 U.S.C. 1154(a)), directs the Comptroller General to "review and evaluate the results of Government programs and activities carried on under existing law." In our opinion, this existing legislation gives us adequate authority to make the evaluation that would be required by this bill. Furthermore, committees having jurisdiction may request our Office to perform desired reviews. We believe such an arrangement, in lieu of a specific legislative requirement, would be mutually advantageous because it would permit us, through discussions with the committee, to

reach agreement on the scope and timing for our initial audit efforts and thus concentrate on the matters of greatest concern to the committee. Accordingly, we recommend that the requirements for the GAO audit be deleted from the bill.

Section 206

This section would, among other things, require the President's budget transmitted to the Congress each fiscal year to set forth separately, within each subfunctional category, the amount of funds for (1) consulting services, management and professional services, and special studies and analyses and (2) all other procurements. Although we support the purpose of this provision to provide the Congress with more information on indirect Federal work force costs, we would prefer an alternative to the proposed change in budget subfunction groupings. We believe this alternative will provide the Congress with more information on the indirect work force, of which consulting services, management and professional services, and special studies and analyses are only a part. Other contract services include such things as janitorial and guard services.

In a March 31, 1981, letter to the Chairwoman, Subcommittee on Human Resources, House Committee on Post Office and Civil Service, we stated the preferred alternative would be to revise the present object class structure to give a clearer and more detailed breakdown of Federal contract work force costs. It would be necessary to add several new object classes to replace the large vague category called "other services" which was more than $60 billion in fiscal year 1980. There will also be the need to separate the obligation amounts into those incurred between Government agencies and those involving non-Government sources. Current budget justification documents will need to be revised and standardized to include, by agency and by program, a more detailed presentation directed specifically at total work force costs. To accommodate these changes, it will also be necessary for the Office of Management and Budget and agencies to revise their budget instructions, forms, and systems. Once these changes are in place, all branches of Government will be able to address any congressional limitations on total work force costs through language in appropriation acts. We prefer this alternative because changes to the object class structure can build a solid foundation for any subsequent changes to the subfunctional budget categories.

While this is an alternative we prefer, we also recognize there are several limitations, primarily the need for the executive branch to develop a detailed implementation plan and the length of time needed to phase in the new structure. Since it will take several budget cycles to successfully accomplish this alternative, it must be considered a long-term effort.

B-199499

Section 207

This section would provide in law a requirement for a Federal Procurement Data System to collect and disseminate information on all contracts entered into by each agency. The system would be required to classify every contract or contract modification over $10,000 as either for professional services or for commercial and industrial type activities and include for each such contract or contract modification many different items of information.

We suggest two changes to this section. The first change concerns the requirement to classify each contract as either professional services or commercial and industrial type activities. These two categories of contracts are not mutually exclusive. For example, a contract for professional services could also be considered a commercial and industrial activity in Office of Management and Budget Circular A-76 (March 29, 1979). We believe more appropriate categories would be (1) contracts for goods and (2) contracts for services.

The second suggested change concerns the requirement for the system to include a brief description of the work to be performed under each contract. The data system does not currently have detailed descriptions of the specific product or service being purchased. Rather, the system has hundreds of standard categories of goods and services, and agencies select the one category that best describes the goods or services being purchased (e.g., "cost benefit analyses" contract or "regulatory" study contract). We are not aware of any demand for more detailed descriptions and are concerned that the cost to provide this additional information on about 400,000 Federal contract actions annually may exceed the benefits. The General Services Administration, which operates the data system, could probably provide specific data on the costs and benefits to add this requirement.

Section 208

This section would require each agency to prepare a written justification for each consulting (and related service) contract awarded by the agency. Although we support the purpose of this section to strengthen agency justifications for consulting services, the Congress recently enacted legislation, as recommended by GAO, that imposes a similar requirement. Section 307(a) of title III, Public Law 96-304, July 8, 1980, requires agencies to include, in their annual budget justifications to the House and Senate Appropriations Committees, a separate justification for all consulting service funds requested, the appropriation accounts in which these funds are located, and a brief description of how

86-956 O - 82 - 10

B-199499

agency programs can benefit from these services. This should provide adequate assurance that all consulting funds requested are needed to carry out Federal programs and provide the Congress with the necessary budget visibility to question the level of funds requested.

Agencies' first justifications required by this law were only recently completed as a part of the fiscal year 1982 budget process. We believe this legislation should be given a chance to work before imposing the more detailed, extensive justifications required by section 208(2) with the accompanying increase in paper work that it would generate. Accordingly, we believe section 208(2) should be deleted.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

15 SEP 1981

Honorable William V. Roth, Jr., Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Roth:

Thank you for your letter of July 9, 1981 enclosing for our comment a copy of Senate Bill S. 719 to amend section 3109 of Title 5 of the U.S. Code concerning the use of consultants by federal agencies. The amendment would clarify the authority of agencies to appoint experts and consultants, and also provides statutory guidelines concerning the award of contracts to procure consulting services, management and professional services, and special studies and analyses.

We share the view expressed in S. 719 that meaningful information about expenditures for the government's use of consulting services must be available to the Congress, the executive branch and the public in order to help ensure appropriate oversight of public funds and help avoid any conflicts of interest. Toward this end, S. 719 provides a means for agencies to summarize their experience with consultants and make such information readily accessible. In this letter, we wish to note areas of general agreement as well as areas where our views may diverge.

Section 101 of the bill, dealing with agency appointment of individuals as consultants or experts, proposes clear and practical definitions for these terms, and limits compensation for such persons to the equivalent of pay for GS-18 federal employees. Each agency would have to report to the Office of Personnel Management (OPM), on a periodic basis, the number of days worked by and amounts paid to consultants and experts. As a result, there would be a central source, OPM, which could provide a broad overview of federal agency use of appointed consultants and experts. We believe such information would be useful, and our staff would not be unduly burdened in compiling and retrieving this information.

Section 202 of the bill deals with contracts for consulting services, management and professional services, and special studies and analyses. Together with sections 203 and 204, there are provisions for publicizing and justifying contracts expending significant amounts of funds for consulting services. For example, notices of proposed contracts in excess of $10,000 must be published in the Commerce Business Daily. Contract modifications in excess of $25,000 would have to be justifed in writing to an agency's Inspector General or similar official. Agencies would have to make written evaluations of contractor performance for contracts in excess of $50,000 for inclusion in the record for each such contract; contractors' comments on their evaluations would also form part of the record.

In addition to providing information on costs, section 203 requires that reports prepared for agencies by consultant contractors identify by name the employees of contractors and subcontractors who substantially contribute to the report, as well as identifying the federal office or employees involved with the contract. Also section 208 requires agencies to compile and make available to the public a list of all agency consultant contracts; section 207 requires agencies to submit detailed contract information to the Office of Federal Procurement Policy for incorporation into a federal data system that would collect and disseminate information on all federal contracts.

Taken together, these provisions for the collection and reporting of costs, expenditures and justifications for all kinds of consulting services, should add significantly to our knowledge of the impact of such services on agency programs. The CPSC already meets many of the requirements for consultant procurements of S. 719, such as the provisions for information retrieval for the Office of Federal Procurement Policy, public notice of proposed contracts, and public availability of lists of CPSC contracts. Likewise, CPSC already provides the identification of outside writers of reports that may be issued by CPSC in conformance with section 413(2) of the HUD-Independent Agencies Appropriation Act of 1981 (Public Law 96-526, Dec. 15, 1980).

Provisions of S. 719 which present new reporting duties are: the requirement that reports on contract modifications over $25,000 be made for an agency Inspector General or similar official, and also that agencies perform written evaluations for contracts over $50,000. Also new is the requirement of section 206 providing that yearly appropriation requests to the Director, Office of Management and Budget, identify procurement requests for consulting services, management and professional services, and special studies and analyses. Section 206 also requires agencies to identify budget authority and justifications for procurement activity to Congress. We anticipate no major workload problems reporting any of the information required by S. 719. The controls described in S. 719, in our view, may well assist agencies in maintaining prudent management of contract information.

We note that section 205(a) deals extensively with conflicts of interest that might occur among persons performing consulting services for the Department of Energy, the Department of Transportation and the Environmental Protection Agency. Although the CPSC is not covered by this section, in our view, it is very important that all persons wishing to enter into contracts with the Commission and all Commission employees involved with such contracts, be free of any real or apparent conflicts between their obligations to CPSC and any of their other interests. In this regard, the CPSC Contracts Branch includes a clause in each consultant-type contract that precludes conflicts of interest

We call the Committee's attention to the following problem areas of S. 719:

(1) Definition of consulting services at section 201(5) - As presently drafted, it is possible to confuse the term consulting services with the term appointed consultants in Sec. 101. Therefore, we recommend that section 201(5) be modified so that it clearly applies only to those consultants whose services are obtained by contract rather than appointment.

(2) Criteria for nonpublication of contracts - Section 202(a) provides that notices of proposed contracts involved with either national security or compelling emergencies need not be published in Commerce Business Daily; we believe this provision as presently drafted is too narrow.

Federal procurement law now provides for nonpublication of contracts "...for property or services as to which the agency head determines that the character, ingredients or components thereof are such that the purchase or contract should not be publicly disclosed" (41 U.S.C. 302(c)(12). (The equivalent statutory provisions for the Armed Services is 10 U.S.C. 2304(a)(12).) Thus, for example, contracts for collection and analysis of data to be used in litigation, are protected against possible premature disclosure of agency litigation strategies. To retain this protection the Committee could consider inserting in section 202(a) of S. 719, the exemption language of 41 U.S.C. 302(c)(12) quoted in this paragraph. If on the other hand, the Committee decides to retain the language of section 202(a) of S. 719 as drafted, we recommend that the Committee consider inserti language in section 202(a) that would permit confidentiality of contracts relating to litigation matters.

(3) Contract modifications report for an Inspector General - Section 202(b) provides that where a contract is modified for an amount of $25,000 or more, a report justifying the modification shall be prepared for the agency Inspector General (IG) or similar official. In contract situations, generally, an IG investigates and corrects fraud, waste and inefficiency that may have occurred during the implementation of a contract. Involving an IG while a contract is being performed could be perceived as weakening the capability of an IG to objectively review and critique performance of a contract after its completion. It is unclear what function the IG would perform upon receiving a report of a contract modification, and whether the report is for information or approval. By not delineating the area of IG involvement, this section appears to add an additional level to the procurement process in derogation of the duties of agency Contracting Officers to administer agency contracts. We suggest, therefore, further Committee review of the IG function involving contract modifications.

(4) Post contract evaluation of contractor performance Section 204(a) provides that for contracts in excess of $50,000 the agency shall prepare a written evaluation of the contractor's performance, including any deviations in time and cost of performance from the originally awarded contract as well as justifications for the deviations. A copy of the evaluation would be sent to the contractor who would have an opportunity to submit comments on the evaluation. Copies of these materials will be maintained in agency records. Under present federal procurement law, agency officials monitor

contractor performance. Thus, written evaluations of contractor performance could be readily accomplished. However, without further guidance, such evaluation could tend to be subjective. It is possible that some contractors could perceive that differing evaluations among the agencies are unfair, and would seek judicial remedies. Consequently, we recommend Committee formulation of a government-wide form setting forth evaluation criteria for contractor evaluation in order to promote uniformity and objectivity of evaluations.

We appreciated this opportunity to comment on S. 719.

Sincerely yours,

Nancy Harvey Steorts
Chairman

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

September 10 1981

Honorable William V. Roth, Jr.
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in reply to your request of April 7, 1981, for a report on S. 719, a bill titled the "Consultant Reform and Disclosure Act of 1981."

This Department opposes enactment of this bill.

The purpose of the bill is "to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, and for other purposes."

All requirements for consulting services contracts exceeding $10,000 would have to be advertised in the Commerce Business Daily unless sensitive information was involved or unless resultant delays would cause serious injury. Each agency would be required to maintain a list of contracts by fiscal quarter. This includes the contracts entered into during the preceding 12 months and this information would be available to the public.

Planned procurements of consulting services would have to be specifically identified and justified in the appropriation request submitted each year to the House and Senate Appropriations Committees. Within 120 days after completion of each contract exceeding $50,000, Federal agencies would be required to complete an evaluation. Copies of these evaluations would be maintained at a central location. Finally, a procurement data system would be established to gather information on contracts and contract modifications exceeding $10,000. Each report prepared by a contractor under a consulting or related contract and each report prepared by an agency which is substantially derived from or substantially includes any such report would be required to include specific disclosure information about the contractor and the procurement process.

Several of the provisions of this bill were previously introduced in 1980 as H.R. 7674 and S. 2880, "Consultant Reform Act of 1980." A similar bill was introduced this year as S. 106, "Federal Reports Authorship Disclosure Act of 1981."

Honorable William V. Roth, Jr.

Most of what this bill requires has already been established as policy in the Executive Branch. Regulations implementing many of its provisions are in place and additional controls are being handled administratively.

On July 2, 1980, the President, through the Office of Management and Budget (OMB), directed the establishment of a tighter, more complete management control system to govern the use of consulting services throughout the Executive Branch. This, together with the revised Federal policy promulgated in April 1980 by OMB Circular A-120, the active work of the Inspectors General, and the Administration's commitment to eliminate inefficiency and reduce expenditures in the use of consulting services should be given a chance to work prior to enactment of additional legislation in this area.

For these reasons and for the reasons cited by OMB in it's report of August 14, 1981, on S. 719, we oppose enactment of this bill.

The Office of Management and Budget advises there is no objection to the presentation of this report by the Department.

Sincerely,

John R. Block
Secretary

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

SEP 15 1981

Honorable John C. Danforth
Chairman
Subcommittee on Federal Expenditures,
Research and Rules
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Commerce on S. 719, a bill

> "To amend Section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, and for other purposes."

The bill would establish statutory guidelines for the employment of experts and consultants and for the award, evaluation and disclosure of contracts for consulting services, management and professional services, and special studies and analyses.

The Department concurs with the views expressed by the Office of Management and Budget in their letter of August 14, 1981 to Senator Roth, a copy of which is enclosed.

The Department's Office of the Inspector General has requested that its views in support of S. 719 be stated separately. We shall be sending these to you under separate cover.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

for Sherman E. Unger
General Counsel

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

The Honorable William V. Roth, Jr.
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your request for a report on S. 719, a bill "To amend section 3109 of Title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, and for other purposes."

In summary, we oppose the bill. While it would update and clarify the current section 3109, and would clarify and standardize additional consulting services activities, it seeks to impose through legislation management controls which already exist. It is unnecessary legislation because recent Departmental and Office of Management and Budget (OMB) actions are accomplishing the same results.

In response to findings that Federal procurement officials have not consistently complied with procurement laws, and that there have been problems associated with the competitive aspects of procurements and with the availability of information, the purpose of this bill is to clarify and amplify Federal policy. It would eliminate the reference in section 3109, Title 5, United States Code, to procuring the services of individuals by contract, and delete the requirement that each agency have separate statutory authority to make such appointments. It would authorize a maximum rate of pay not to exceed the GS-18 rate of basic pay for individuals appointed under section 3109. It would also define various types of consulting activities (e.g., "management and professional services" and "special study or analysis"). Finally, it would establish uniform management controls for consulting services activities.

The Department of Health and Human Services places a high priority on the proper use of appointed experts and consultants and on consulting services contracting. The bill would largely confirm existing Federal and Department policies and practices. Over the last several months we have taken steps to tighten further our controls, including a plan to improve our management of procurement, which OMB approved in August 1980, and which details the actions we have taken and are taking to insure the proper and effective use of consulting services. The Inspector General tracks implementation of that plan and reports our progress to the Congress through OMB.

Similarly, one of the President's first acts on taking office was to restrict the use of consulting services by imposing an immediate reduction in expenditures. This action, combined with both Departmental and OMB controls, is successfully reducing expenditures, while at the same time increasing management accountability and effectiveness. This bill would serve only to legislate existing management controls, and as such would reduce the Executive Branch's management flexibility to deal with the problems it seeks to resolve.

For these reasons and for the reasons cited by the Office of Management and Budget in its report on S. 719, we oppose this bill.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Secretary

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 10 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 719, the "Consultant Reform and Disclosure Act of 1981."

The Department of Justice opposes enactment of this legislation. Provisions of the bill will significantly impair the Department's law enforcement and litigation responsibilities.

First, as noted in the correspondence to the Committee from the Honorable Edwin Harper, Deputy Director, Office of Management and Budget, the proposed legislation is an inappropriate derogation of the managerial responsibilities of the Executive Branch. Additionally, recent initiatives of the Office of Management and Budget accomplish the results S. 719 is designed to achieve.

Second, section 206 of the bill is objectionable because it requires that the Department's annual budget submission to the Office of Management and Budget identify the dollar amount for contractual services such as expert witnesses, consultants, or professional services. The Department's need for such services frequently cannot be projected in advance and can only be ascertained as a particular case develops. Thus, compliance with section 206 in its present form would not be possible in a meaningful or accurate manner.

Third, section 202 of the bill is objectionable because it requires publication in the Commerce Business Daily of a written notice of an intent to contract for a special study or analysis where the cost is expected to exceed $10,000. This requirement creates the risk of prematurely alerting targets of investigations, and also imposes delays that might seriously hinder the Department's efforts in both civil and criminal matters. When the Department determines that such services are necessary, it is often imperative that they be provided promptly to avoid any delay in investigations or prosecutions.

Fourth, section 208 of the bill, which requires each agency to maintain a quarterly list of all its ongoing contracts and their status, is objectionable because it also would make public expert witness contracts during the course of ongoing litigation. In the

context of civil litigation, this requires disclosure of information that a party would not otherwise be entitled to. To the extent the contract is sufficiently detailed to reflect an attorney's work product, section 208 appears to run counter to the public policy of protecting the attorney work product from discovery by an opponent in litigation. Hickman v. Taylor, 329 U.S. 495 (1947). Generalizing such contract terms to the point where they do not reflect attorney work product would make them difficult to enforce. Our concern extends not only to the operations of this Department, but also to our client agencies, which submit to the Department extensive memoranda, materials, and information in preparation for litigation.

Similary, section 209 of the bill, which exempts from the bill's coverage those contracts "which relate to sensitive law enforcement investigations," is objectionable because this exemption may be construed too narrowly. The qualifying term "sensitive" could be so construed as to significantly limit the exemption's applicability. As a result, S. 719 could be read to require public listing and public access to other types of contracts entered into in connection with "sensitive law enforcement investigations," such as leases of apartments or business sites used for surveillance purposes. Additionally, section 209 does not appear to exempt from disclosure contracts for services required during the course of civil and criminal litigation. As stated above, failure to confer such an exemption creates a potential that the Government's position in a legal action will be compromised through disclosure of sensitive material or information.

Lastly, section 204(c) which provides for the transmittal of a contract evaluation to the contractor concerned, is objectionable because it may jeopardize the preparation of completely candid reports.

For the above reasons, the Department of Justice opposes enactment of S. 719.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

ROBERT A. McCONNELL
Assistant Attorney General

DEPARTMENT OF STATE

Washington, D.C. 20520

AUG 24 1981

Dear Mr. Chairman:

Secretary Haig has asked me to respond to your request for comments on S.719 which would amend section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services and special studies and analyses, and for other purposes.

The Department of State attaches great importance to the effective and prudent use of experts and consultants and use of contracts for procurement of consulting services. In April 1980 the Office of Management and Budget promulgated guidelines on the use of consulting services (Circular No. A-120). The Office of Personnel Management has issued directives on use of consultants and experts.

In the view of the Department of State, it would be preferable to allow enough time for the OMB guidelines to be fully implemented and tested. We believe that practical experience with these guidelines will be helpful in determining what modifications may be necessary and what, if any, statutory guidelines may be desirable. In the meantime, we believe it would be premature to legislate policy on contracts for procurement of consulting services. For these reasons the Department of State opposes enactment of S.719.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to submission of this report.

Sincerely,

Richard Fairbanks
Assistant Secretary
for Congressional Relations

The Honorable
William V. Roth, Jr.,
Chairman,
Committee on Governmental Affairs,
United States Senate.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

SEP 4 1981

IN REPLY REFER TO:
3010

Honorable John C. Danforth
Chairman, Subcommittee on Federal
Expenditures, Research, and Rules
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Danforth:

This letter is in response to your August 5, 1981, request for the views of the Federal Communications Commission regarding the "Consultant Reform and Disclosure Act of 1981" (S. 719). Senator Roth, Chairman of the Committee on Governmental Affairs, made a similar request by separate letter. The comments in this letter are based on an initial staff review of the bill and represent only the views of the Commission's General Counsel.

The Commission has engaged a substantial number of outside consultants in the past to assist us in the complex task of understanding and regulating the rapidly changing telecommunications industry. For example, during fiscal year 1980, the Commission awarded approximately $690,000 in consulting services contracts (each contract in excess of $10,000). Because of our substantial involvement with consulting contracts, the Commission is naturally interested in the provisions of S. 719. In lieu of oral testimony, we respectfully request that your Subcommittee include this letter containing our views and comments in the upcoming hearing record.

The bill appears to have two main themes : effective management of contract award and execution and increased disclosure of contract details. Although we generally endorse both of these themes, we do have some particular concerns with respect to the following matters: 1) the extent to which the proposals in this bill exceed current administrative burdens and the necessity for imposing additional burdens, 2) possible harmful restrictions on our hiring process that may be imposed by the bill, and 3) ambiguous language in key sections of the bill. We now turn to discuss those particular sections that raise concerns.

At the outset, it is noted that we read Title I of the bill, entitled "Appointments", and Title II, entitled "Contracts",

Honorable John C. Danforth

as setting forth mutually exclusive options for hiring consultants. Simply stated, we read Title I as allowing the Commission to hire an expert or consultant on a non-competitive basis and to compensate that person out of funds allocated to payroll. We read Title II as applying to consultant services acquired through the competitive procurement process (where the agency elects this option); these services would be compensated from funds allocated to consulting services contracts. If this reading of the bill is not correct, we would like to be so advised.

Our only particular concern about Title I is with the language of Section 101(c) which appears to say that an agency head may not appoint positions in the Senior Executive Service on a temporary basis, as contemplated by Section 101(b). To illustrate our concern here, the Commission recently hired an employee to fill the position of chief of one of its major bureaus. Because his application for permanent appointment was delayed at the Office of Personnel Management, the Commission appointed him as a temporary consultant so that the position could be filled immediately. If Section 101(c) prevents this kind of temporary appointment from being made, important Commission business might have to be delayed if a similar problem arises later. We urge the Subcommittee to consider this possible problem.

Section 202(a), entitled "Publication of Contracts", raises several concerns. First, we believe the language in Section 202(a) is somewhat ambiguous. We are not entirely clear from our reading whether this section requires publication of prospective contracts in order to require competitive bidding, thus curtailing non-competitive awards, or whether this section requires publication merely to inform the public and encourage competitive bidding, but not necessarily to require it. While a reading of the entire bill suggests that Section 202(a) is intended to promote rather than require competitive bidding, we urge the Subcommittee to make clear, through clarification of Section 202(a) or in the legislative history, that this Section supplements but does not supercede other procurement statutes. For example, Section 252(c)(4) of the Federal Procurement Procedures, 41 U.S.C. § 252(c)(4), provides that contracts for personal or professional services may be negotiated by a government agency without advertising; that is, they may be negotiated on a non-competitive basis. Section 202(a) of the bill does begin with a "notwithstanding" clause, which suggests that the Subcommittee does not intend to supercede 41 U.S.C. § 252(c)(4). We urge the Subcommittee to make clear the relationship between these two sections in order to avoid possible confusion.

96-956 O - 82 - 11

Honorable John C. Danforth

If competitive bidding is required by Section 202(a), we ask the Subcommittee to consider an exemption for the expert witness, which the Commission hires from time to time to provide evidentiary support in trial-type or adjudicative proceedings. In the past, the Commission has hired expert witnesses on a non-competitive basis. We believe that the competitive procurement process is inappropriate for selecting such witnesses in many cases. Thus, if the Title I appointment option is unavailable for some reason (such as shortage of funds), it would appear that Section 202(a) might require the Commission to hire an expert witness on a competitive procurement basis. If that is the intent, then we would urge the Subcommittee to exempt expert witnesses from the competitive process. In particular, the Subcommittee could add new Section 202(a)(3) and exempt from the publication requirement the acquisition of an expert witness for a trial type or adjudicative proceeding.

Section 202(b) provides in part that notice must be given to the agency's Inspector General or equivalent officer when a contract modification is expected to increase the contract amount by $25,000 or more. However, this section does not state what action, if any, the agency officer may or must take after receiving such notice.

Section 203 of the bill seems to require each agency (as well as each contractor) to include certain contract details when preparing a report based upon consulting services, management and professional services, or special studies. At the present time, the Commission voluntarily compiles and maintains for future reference many of these contract details, such as the name and address of the contractor and the name of the Commission employee who authorized the award. Thus, the additional burden imposed by Section 203 appears to be minimal.

Section 204 requires each agency to prepare and maintain a contract evaluation report for contracts in excess of $50,000. No such requirement exists now, and our first impression is that the additional paperwork burdens might exceed the perceived benefits. However, we recognize that one major benefit would be to create a ready reference of contract performances for Commission personnel involved in the awarding of contracts.

Section 206 of the bill, in some respects, does not appear to alter significantly the Commission's current budget practices but, in other respects, may dramatically increase our paperwork requirements. Section 206(a) requires each agency head to include in its annual budget proposal "an itemized statement of the amounts requested" for consulting services, and to conform

these statements to the "subfunctional categories to be used by the President". Since the Commission's budget exhibits for consulting services are now itemized by subject areas, we foresee little problem in making the adjustments proposed here. We also have no major concern about separate classifications for consulting procurements and other procurements.

Section 206(b) appears to apply primarily to the Office of Management and Budget, but also suggests the necessity for cooperation by each agency.

However, Section 206(c) has direct consequences for this agency. Section 206(c)(1) would require the Commission, for the first time, to submit to Congress each year an analysis of each new budget request for consulting services, an estimate of outlays, and a justification for each request and estimate. At the present time, we furnish this information on an ad hoc basis, but only occasionally and as requested by Congress. These requirements would greatly increase the workload of the Commission's budget office and might necessitate hiring additional personnel. These same comments apply to Section 206(c)(2), with respect to agency reports required when the President revises Budget requests or estimates. We urge the Subcommittee to consider carefully the additional burdens to our daily workload that surely will result from enactment of Section 206(c).

Section 207 requires the Administrator for Federal Procurement Policy to establish a procurement data system regarding all procurement contracts entered into by agencies such as the Commission. To comply with this Section, the Administrator will have to establish a new reporting requirement for agencies which will include more information than agencies will be required to list in their public files by Section 208(a)(1). Thus, the information compiled in compliance with Section 208 will not be adequate to comply with Section 207, and agencies may be faced with a substantial paperwork burden as a result of Section 207.

Section 208 of the bill would require each agency to make available to the public a list of all contracts (with certain contract details) awarded by the agency during the preceding twelve months. At present, the Commission voluntarily maintains a file similar to that required by Section 208(a). Our first impression is that this section alone will not impose any significant additional burdens on the Commission.

In conclusion, we generally support the two main thrusts of this bill. However, as discussed above, we are concerned with the additional paperwork requirements contemplated in the bill,

Honorable John C. Danforth

particularly in Sections 204, 206, and 207, and we question whether the perceived benefits are worth the additional burdens. We are also concerned that the bill could complicate the hiring of expert witnesses or certain key personnel. Finally, we have cited certain sections which we believe to be ambiguously worded and which may need clarification.

Thank you for the opportunity to comment on S. 719.

Sincerely yours,

Stephen A. Sharp
General Counsel

cc: Honorable William V. Roth
Chairman, Committee on Governmental Affairs

International Communication Agency
United States of America

Washington, D.C. 20547

USICA

September 4, 1981

Dear Mr. Chairman:

Thank you for your letters of August 5th and 17th advising this Agency of the hearing date on S. 719, the "Consultant Reform and Disclosure Act of 1981," and requesting our written views concerning that legislation.

We have reviewed OMB's letter to Senator Roth of August 14 opposing enactment of S. 719, and we wish to express our concurrence in that letter.

Sincerely,

Marilyn Dexheimer /prs

Marilyn Dexheimer
Congressional Liaison Officer

The Honorable
John C. Danforth, Chairman
Subcommittee on Federal Expenditures,
Research and Rules
Committee on Governmental Affairs
United States Senate

CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436
September 10, 1981

Honorable John C. Danforth
Chairman, Subcommittee on Federal
Expenditures, Research, and Rules
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for writing to us on behalf of the Subcommittee on Federal Expenditures, Research, and Rules regarding Senate Bill 719, the "Consultant Reform and Disclosure Act of 1981". You requested our comments on the provisions of the bill.

As you know, the Commission is an independent agency with quasi-judicial responsibilities. The Commission relies almost exclusively on its own staff in the performance of its statutory functions and rarely uses private consultants or experts to carry out those functions. Moreover, in those cases in which the Commission does use private consultants, Senate Bill 719 would appear to have little impact on the Commission's operation. The one exception is Title II, Section 206 which requires detailed data to be provided to the Office of Management and Budget (OMB), as part of the annual budget process. The Trade Act of 1974, Title II, Section 175, excludes the Commission from sending such data to OMB. However, the data would be available to the Commission's authorization and appropriations Committees and Subcommittees, and to the public.

Please continue to call on us whenever we can be of assistance.

Sincerely,

Bill Alberger

Bill Alberger
Chairman

Interstate Commerce Commission
Washington, D.C. 20423

OFFICE OF THE CHAIRMAN

August 18, 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Attn: Miss Pauline Hildebrandt

Dear Mr. Chairman:

Thank you for your letter of July 9, 1981, requesting the Commission's comments on S. 719, the "Consultant Reform and Disclosure Act of 1981." I understand that the Committee has tentative plans for hearings on the subject of consultant reform in the fall. I hope that the following brief comments will aid in the development of the record on this legislation.

S. 719 is intended to be a form of "sunshine" legislation to disclose the extent of federal use of consultants. The apparent goal of the bill is that the publication of specified contracts will deter abuses in consultant employment practices and will provide data upon which Congress can base further reforms.

Title I of S. 719 would authorize the Office of Personnel Management (OPM) to prescribe regulations governing the employment of appointed experts and consultants. In addition, each agency head would be required to establish procedures for the review and approval of any determination relating to the need for such services and the appointment of each expert or consultant. The bill would also require agencies to report periodically to OPM regarding the number of days each appointed expert or consultant was employed by the agency and the amount paid to each appointed expert or consultant during the period.

Under Title II, upon completion of a procurement request for consulting or other services which is estimated to result in the award of a contract exceeding $10,000, an agency would be required to transmit a notice to the Secretary of Commerce for publication. If a contract was modified so that the contract award would increase by $25,000 or more, the agency would have to notify the Inspector General of the agency (or the head of the agency

or his designee if the agency did not have an Inspector General). The bill would also require public disclosure of information concerning the use of contractors and a written evaluation of contract performance for any contract exceeding $50,000, within 120 days of completion of the contract.

Another major provision of this Title would require each agency to include in its annual budget submission to the Office of Management and Budget an itemized statement of the funds requested for consulting and certain other service contracts and to justify each such request during the budget justification process before Congress. Organization conflict of interest determinations for consulting and certain other service contracts would be required on a test basis at the Departments of Energy and Transportation and the Environmental Protection Agency. Finally, the bill would require agencies to compile, and make available to the public, information regarding contracts entered into by the agency.

S. 719 is very similar to legislation which Senator Pryor introduced in the last Congress--S. 2880, the "Consultant Reform Act of 1980." In general, the Commission endorses the objectives of this legislation. The process of procuring consulting and other services to aid in performing governmental functions needs to be improved and made more efficient. The provisions of S. 719 represent significant steps toward realizing these goals. However, the Commission has several concerns which I would like to bring to your attention.

Our major concerns with S. 719 revolve around the requirements of this legislation when a study or report prepared by a consultant is used in connection with a formal proceeding. For example, Section 203 provides that each report prepared by an agency which is substantially derived from a report prepared by a contractor shall include specific information regarding the contract. We believe that this is appropriate in the case of an agency issuing a study. However, in a formal proceeding, the report of this agency is the "decision" of the Commissioners. While the information required by this section should be available to the public, we do not feel that it should be printed as part of the decisions of the Commission which are based on formal proceedings.

The Commission has a similar concern with Section 204 of S. 719 which would require an agency to prepare a written evaluation of contract performance within 120 days after completion of a consulting contract. Frequently, contractors' reports which are prepared in connection with a formal evidentiary proceeding are submitted more than 120 days before the close of the proceeding. Therefore, the Commission would be required to evaluate such a report before all of the evidence was presented and a decision reached. We believe that in such cases, 120 days after completion of the evidentiary record would be a better deadline for evaluating these reports. This would help avoid confusion and the necessity of the Commission evaluating a report upon which a decision may be based, at least in part, before the decision is reached.

Although Section 205 as presently drafted sets up a temporary pilot project which is not applicable to the Commission, we would like to express some reservations about its provisions. Section 205 deals with the use of consultants who have an "organizational conflict of interest," and our principal concern with this section is with the definition of that term. The definition seems to preclude agencies' contracting for services with industries which they regulate or with which they otherwise deal. There are times when an agency requires information which can be provided only by persons who may, under this bill, have an "organizational conflict of interest." In light of the other safeguards in this legislation, it would not appear to be necessary to preclude all contracting with persons who deal with or are regulated by the contracting agency.

Thank you again for the opportunity to comment on this legislation. If I can be of further assistance in this matter, please let me know.

Sincerely yours,

Reese H. Taylor, Jr.
Chairman

NASA
National Aeronautics and
Space Administration

Washington, D.C.
20546

Reply to Attn of C:MAM:tsc:C494lf

AUG 25 1981

Honorable John C. Danforth
Chairman
Subcommittee on Federal Expenditures,
Research, and Rules
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter is in response to your letter of August 5, 1981, requesting the comments of the National Aeronautics and Space Administration on the bill S. 719, the proposed "Consultant Reform and Disclosure Act of 1981."

We have reviewed S. 719 and oppose enactment of the bill. Our objections to the bill are as follows.

The proposed definition of "contract" in section 201(2) of the bill would embrace purchase orders (i.e., actions not exceeding $10,000) as well as large dollar value actions. The definition also would extend to administrative change notices, letters of authorization and letter contracts. When related to the other reporting and monitoring provisions of the bill, we believe this definition would create a great deal of new paperwork and unwarranted burdens on the agencies. In addition, section 201(2) would include "agreements" in the definition of "contract". This is inconsistent with existing law, namely the Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. 503), which distinguishes agreements from contracts. We believe clarification is needed to resolve this inconsistency. Also, we believe the "(B)" portion of the definition of "contract" in section 201(2) pertaining to letters authorizing a contractor to provide goods or service, is unnecessary.

We object to the inclusion of "manual" in the definition of the term "report" in section 201(4) of the bill, since it is not similar to the other types of documents listed in that definition.

It is not clear from the definitions of "consulting services", "management and professional services" and "special study or analysis" in sections 201(5), (6) and (7) whether the research and development and technology assessment activities of NASA are within or beyond the scope of the bill. We would oppose any legislative alteration to the policy in OMB Circular No. A-120, dated April 14, 1980, stating that "It should be noted that the conduct of research and development and technology assessments are not consulting services".

In section 201(6) of the bill the term "professional services" is used to define "management and professional services". However, the term itself is not defined, although this term is important both here and later (section 207(a)) for comprehension of the text.

Section 202(a) relating to "Publication of Contracts" appears to supersede the current requirement in 15 U.S.C. 637(e) for notice and publication of consulting services contracts. A major difference between this section of the bill and the current statute is that this section repeats only two of the ten exceptions to the notice and publication requirements in the current statute. It is unclear whether the failure to repeat in section 202(a) the other eight statutory exceptions makes them all inconsistent with that section. A similar question is presented with respect to whether if section 202(a) is enacted, the Secretary of Commerce would retain any authority conferred by the current statute to obtain such notices.

Section 202(b) of the bill would require that whenever an agency modifies a contract for consulting, management or professional services, or a special study or analysis, and the modification increases the contract price by at least $25,000, the agency would be required to transmit to the Inspector General a written notice describing the original contract, the modification being made, and the justification for the modification. This data requirement would create additional paperwork burdens which, in our opinion, would serve no useful purpose in that such information would be readily available to the Inspector General under the access to information provisions of the Inspector General Act of 1978, and could be scrutinized by IG staffs in any routine audit of consultant service arrangements.

Section 203 would require each report prepared by a contractor, to reflect six categories of information (seven if organizational conflict of interest is involved). We believe this provision would create a great deal of new paperwork and impose an unwarranted burden on the agencies. In particular, the fifth category of data requires any report to list all subcontractors who carried out any portion of the prime contract. In the case of large contracts involving many subcontractors, the burden would be compounded. The same may be said for the sixth category requiring the names of all contractor and subcontractor employees who contribute substantially to the report.

Section 204 relating to "Contract Evaluation" would be operative with respect to each contract over $50,000 that provides for consulting services, management and professional services, or a special study or analysis. The section would require each agency to place an evaluation of the contract performance, including contractor deviations from contract provisions affecting cost and time, in the contract file and in a central location within the agency within 120 days after completion of performance. This provision would cause, we believe, an unnecessary increase in Federal government paperwork. In addition, we believe it would likely produce numerous requests under the Freedom of Information Act as well as informal appeals to higher authority.

Sections 206 ("Budget Identification and Justification"), 207 ("Federal Procurement Data System") and 208 ("Public Availability") appear to apply to all types of contracts and procurement activities and thus we believe exceed the scope and purpose of the bill which applies primarily to contracts for "consulting services", "management and professional services" and "special study or analysis" specified in sections 201(5), (6) and (7) of the bill. We believe these general provisions could be accomplished better by the Office of Federal Procurement Policy by regulation rather than legislation. We have the following additional concerns.

The provisions of section 208 ("Public Availability") would require the creation of certain records, including a list of all contracts entered into during the preceding year with supporting data; a list of contracts where performance is incomplete with supporting data; and a statement justifying the need for each contract for consulting services, for management and professional services, or for a special study or analysis. These requirements, when combined with other requirements set forth in the bill, in our opinion, would create an unwarranted administrative burden on the agencies at a time when Federal government resources are being diminished. In addition, the requirement for a written justification for the mentioned services appears to duplicate the budgetary justification requirements in section 206, which would require budgetary identification, analysis and justification for the types of contracts specified in Title II of the bill.

Finally, the opening sentence of section 208(b) of the bill states an exception that disclosure is not required for a contract or any information therein which is "prohibited by law". The Freedom of Information Act has several exemptions which have been termed "discretionary". These include commercial and financial information and interagency and intra-agency memoranda. The language in 208(b)(1)(A) and (B), especially when read in conjunction with section 210, raises a serious question as to whether the "discretionary" exemptions could be applied to any contract or to certain information (e.g., the name and qualifications of consultants, etc.) specified in section 208(b)(1)(B). It is also not clear whether the requirement in (B) would constitute a change to the Privacy Act of 1974, 5 U.S.C. 552a. Section 208(b)(2) raises a similar issue, since it states that (b)(1) does not require technical proposals to be made available to the public, but it does not make clear whether this also applies to information from those proposals which may appear in the contract (e.g., pursuant to OMB Circular A-109).

For the foregoing reasons, and reason cited by OMB in its report on S. 719, the National Aeronautics and Space Administration would oppose the enactment of S. 719.

The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the submission of this report to the Congress.

Sincerely,

Michael A. Maguire

for Terence T. Finn
Director, Office of
Legislative Affairs

NATIONAL SCIENCE FOUNDATION
WASHINGTON D.C. 20550

OFFICE OF THE
GENERAL COUNSEL

October 1, 1981

Honorable John C. Danforth
Chairman, Subcommittee on Federal
Expenditures, Research, and Rules
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Danforth:

Your letter of August 5, 1981, asked for comments on S. 719, the "Consultant Reform and Disclosure Act."

While we are in agreement that agencies should seek professional services on a competitive basis and with firms or individuals who can render objective advice, we question whether the proposed legislation will actually enhance the accomplishment of this. Many of the provisions of the bill appear to duplicate existing law or administrative practice. Moreover, we are concerned that the conflict-of-interests provisions are overly complicated and cumbersome. Such matters should be dealt with through administrative guidelines, in particular, the Federal Acquisition Regulation developed by the Office of Federal Procurement Policy of the Office of Management and Budget. Thus, we do not favor the enactment of these provisions as they now stand, even on an experimental basis.

There is one other specific aspect of the bill that especially concerns us. In particular, the definition of "appointed consultants" in the proposed amendment of 5 USC 3109 would not appear to encompass appointment of individuals who do not have "a high degree of knowledge" in the particular field on which they are to advise. We have situations in which we appoint laypersons to serve on advisory groups to evaluate particular programs, such as science education efforts. We also sometimes establish advisory groups with persons of varied scientific backgrounds to help evaluate the merits of some new program in a specific field outside their own. In short, consultants are hired for reasons other than are defined in amended 5 USC 3109(a)(2). It is not clear how they are intended to be treated. Would the revision preclude the use of "non-expert" consultants? We urge you to give specific attention to this question.

The Office of Management and Budget has advised us that there is no objection to the submission of this report from the viewpoint of the Administration's program.

Sincerely yours,

Charles H. Herz
General Counsel

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

November 19, 1981

The Honorable John C. Danforth, Chairman
Subcommittee on Federal Expenditures,
Research, and Rules
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

At your Committee's invitation, the NRC would like to comment on S. 719, the proposed "Consultant Reform and Disclosure Act." Although the NRC agrees with the basic purposes behind this legislation - to maximize competition, to consider organizational conflicts of interest, and to provide a documented record of government contracts for public information, it does not believe that enactment of S. 719 would be appropriate at this time. Further comments, both in general and on specific sections, are provided in the enclosed attachment.

Sincerely,

Nunzio J. Palladino

Enclosure:
As stated

cc: The Honorable Lawton Chiles
United States Senate

NRC COMMENTS ON S. 719, "CONSULTANT REFORM AND DISCLOSURE ACT"

This bill appears to be overbroad in treating contracts for management data collection services, program management support services, and system engineering services the same as consultant contracts. Contracts of the former types have not been subject to the same abuses as consultant contracts, and putting them within the scope of this legislation is unwarranted.

It is also unclear that legislative action in this area is necessary in light of recent initiatives undertaken by the Office of Management and Budget (OMB) which may well achieve many of the bill's objectives. Specifically, on April 14, 1980, OMB issued Circular A-120, "Guidelines for the Use of Consulting Services," which provides both policy and guidelines to be followed in the use of consulting services. Additionally, the requirements of the Office of Federal Procurement Policy letter 81-1 for advance procurement planning (beginning with the budget process) and the highlighting of "high waste vulnerability projects" such as consultant contracts promise to improve the management of contracts within the scope of S. 719. Further, objectives of S. 719 such as its requirement for a written evaluation of the contractor's performance may already be achieved simply through Executive Branch action.

In addition to these general comments, the NRC would like to make the following comments on specific sections. The effect of this bill on the activities of the Advisory Committee on Reactor Safeguards (ACRS), which reviews and reports to the Commission on the hazards and adequacy of reactor facilities and safety standards, is unclear. While the Committee itself is created by statute so that its members, who serve four-year terms, apparently do not fall within the requirements of S. 719, the Committee carries out its functions through the use of consultants who apparently do fall within the coverage of S. 719. The ACRS, which deals with constantly changing technological problems, utilizes mainly two types of consultants to provide the necessary expertise to deal with these technological issues: (1) It uses individuals in areas of concern for one-year terms as special government employees, and (2) it utilizes consultants from the DOE contractor organization as the need arises through its DOE-NRC Memorandum of Understanding, reimbursing DOE for their use. First, S. 719 does not specifically deal with such Memoranda of Understanding, and it is unclear under the bill what the relative reporting requirements, if any, of DOE and NRC would be. This should be clarified. Moreover, although NRC does not read this bill as applying to ACRS members, it should be stated, either in the bill or in a Statement of Considerations, that the provisions of this bill do not apply to statutorily created advisory committees such as the ACRS. As to the special government employees used by the ACRS, the NRC understands that they would fall under Title I of S. 719, relating to the appointment of consultants, but that they would not fall under Title II as they are not hired to provide a single

special study or report, which seems to be the focus of Title II. Again, however, the NRC believes that this understanding should be stated specifically either in the bill itself, or in a Statement of Considerations, by adding explanatory language that Title I was intended to cover the general employment of experts and consultants, while Title II was intended to cover a contract to procure a single specific individual report, special study, etc.

Section 202 requires agencies to notify the Secretary of Commerce when it estimates that a contract for covered services will exceed $10,000, and section 207 has a list of requirements for contracts in excess of that amount. Section 204 similarly provides for a contract evaluation only when the total amount of the contract exceeds $50,000. However, the other sections of Title II have no such dollar limitations. Some of the specific requirements of Title II are onerous by their nature and might inhibit individuals from seeking such contracts, particularly when small amounts of money are involved. In order to address this problem and to simplify and reduce the amount of reporting required under Title II, the NRC suggests that there be a dollar limit below which the requirements contained in Title II would not be applicable. This would alleviate excessive paperwork and resultant expense in minor contracts which do not warrant such extensive reporting and other requirements. The NRC recommends that contracts for less than $10,000 be exempted from the requirements of Title II.

Section 202(b) provides that justifications for contract modifications which increase the amount of the award by at least $25,000 must be transmitted to the Inspector General or comparable official. Such a procedure is far outside normal procurement channels, and if this provision is read as requiring that the Inspector General approve the justification, it could well prove unworkable.

Section 208(a)(1) requires compilation of a publicly available list of the names of the individual employees who authorize a government contract and administer the program under any given contract. The NRC is concerned that providing this list of individuals will allow potential contractors to easily contact the technical representatives who are involved in a particular program area. Technical representatives, because they are not trained in discerning whether particular information is authorized for public release, may be more likely to release unauthorized information than the contract specialists with whom contractors normally deal. Given this concern, the NRC believes that names of the technical representatives should not be made publicly available absent some compelling need.

Section 208(b) provides that contracts shall be considered public information unless prohibited by law or unless of a classified nature. It appears that this public disclosure is intended to apply to all aspects of a contract, including personnel-related information such as

86-956 O - 82 - 12

direct labor rates, overhead costs, general administration rates and a listing of key persons performing the contracts. The availability of such information could provide a convenient vehicle for competitors bidding on a contract in the same area to exploit the bidding process by using the financial information provided in a similar contract. The NRC believes that standards for public disclosure of such financial, personnel and proprietary-type information should be consistent with the terms of the Freedom of Information Act.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 1981 PM 4:48

Honorable William V. Roth
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of April 7, 1981, requesting the views of the Office of Management and Budget on S. 719, a bill

> "To amend Section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, and special studies and analyses, and for other purposes."

S. 719 seeks to reform agencies' use of consultants by amending both the personnel laws (title I of the bill) and the contract procurement laws (title II of the bill), under which agencies are authorized to acquire consulting and related services. The bill would add a number of disclosure and other requirements to guard against potential conflicts of interest in the use of consulting and related services by Federal agencies.

In summary, we oppose enactment of S. 719. Although the bill would update and clarify certain provisions of 5 U.S.C. 3109 (employment of individual experts and consultants), something we agree that ought to be done, it also seeks to impose through legislation management controls on certain government contracting activities that already exist. The legislation is unnecessary to the extent it concerns Federal contracting, because recent initiatives of the Office of Management and Budget will accomplish the results that S. 719 is designed to achieve.

Title I of S. 719 would amend 5 U.S.C. 3109, concerning the general authority of Federal agencies to employ experts and consultants. Section 3109 has long been a source of confusion, and we do favor legislative action to alleviate that confusion. The Office of Personnel Management will provide the Committee with detailed comments on title I of S. 719; however, title I of S. 719 appears to be an improvement over title I of S. 2880, a similar bill considered in the 96th Congress.

Our principal objections to S. 719 relate to title II. To a large extent, the requirements of title II are already prescribed by other statutes, or by OMB, and agencies are implementing these requirements through management control systems. In our view, the management of the procurement function is properly the responsibility of the Executive Branch. Although we certainly agree that Congressional oversight of Government contracting is appropriate, we believe that the statutory constraints that S. 719 would impose on Federal agencies would severely hamper the effective and efficient management and coordination of Federal consultant services contracting.

OMB, through its Office of Federal Procurement Policy, is already acting to improve the management of consulting services. We recognize, of course, that many of the agency management problems associated with consulting services are prevalent in certain management and professional services, special studies and analyses, and similar services for research and development activities. Accordingly, OMB is considering issuing a Bulletin and a revision of OMB Circular No. A-120 (Guidelines for the Use of Consulting Services) that would --

-- extend the management controls in OMB Circular No. A-120 to contracts for certain management and professional services, special studies and analyses, and comparable services for research and development activities;

-- curtail the award of personal services contracts for consulting and any of the above services; and

-- remove incentives for the use of unsolicited proposals, which result in inappropriate sole source awards for consulting services, management and professional services, and management support services for research and development activities.

We have also made reductions in Federal consulting services. These reductions are reflected in the President's revised budgets for 1981 and 1982.

In a July 2, 1981 memorandum to all agency heads, OMB directed the agencies to develop management control plans for procurement, in general, and consulting services, in particular. The agencies are now implementing these plans. It will take time to see results, but the Inspectors General are evaluating and monitoring the agencies' implementations and will report to Congress and OMB on the results of their reviews.

In conclusion, we believe title II of S. 719 is an unnecessary derogation of the managerial preogatives and responsibilities of the Executive Branch. For that reason, we respectfully oppose the bill.

We have attached for your reference detailed comments regarding specific sections of title II of S. 719. If we may be of additional assistance, please let us know.

Sincerely,

Edwin L. Harper
Deputy Director

Enclosure

DETAILED COMMENTS ON SECTIONS OF TITLE II OF S. 719

Section 201. Definitions: The definitions of "contract" and "contractor" are not consistent with those in the Federal Acquisition Regulation. The definition "consulting services" is not entirely consistent with OMB Circular No. A-120, "Guidelines for the Use of Consulting Services." The definition of "report" is too broad and would cover, for example, technical equipment manuals furnished in connection with construction and other contracts.

Section 203. Disclosure of Information Concerning the Use of Contractors: OMB already requires that all reports containing recommendations to the agency submitted during the performance of a consulting services contract contain on the cover of the report the following information: (a) the name and business address of the contractor; (b) the contract number; (c) the contract dollar amount; (d) whether the contract was competitively or non-competitively awarded; and (e) the name of the sponsoring program individual in the agency, and his or her office identification and location.

We strongly object to requiring this kind of disclosure on the covers of agency-prepared reports that contain portions of a contractor's report, because we believe that all agency reports should be judged on their merits, not on the source of their data. In our opinion, this recommendation presumes that if a contractor was involved in preparing the report, the content of the report is "suspect." In the final analysis, however, the agency preparing the report is responsible for its content, regardless of the source -- contract or in-house -- used in developing the report.

Section 204. Contract Evaluation: OMB already requires this information. Agencies' management control plans include agency-wide procedures to assure regular written evaluations of the performance of each consulting services contractor. The new OMB Bulletin, discussed earlier, will extend this requirement to contracts for certain management and professional services, special studies and analyses, and similar services for research and development activities.

Section 205. Organizational Conflict of Interest: We believe that it is inappropriate to legislate in an area requiring subtle, complex, and subjective determinations. This is particularly true in view of the imminent release of OFPP's Federal Acquisition Regulation (FAR), Subpart 9.5, "Organizational Conflicts of Interest." The FAR provision represents years of study and effort. The OFPP proposal, published August 1, 1980, represents a sound Federal policy. Federal agencies should be given an opportunity to implement that policy.

Section 205 is replete with unworkable requirements that will substantially reduce the ability of Federal agencies to obtain professional services of the highest quality. Examples of the most objectionable of these requirements are the following:

-- The definition of "organizational conflict of interest" includes "anticipated interests" that directly or indirectly relate to work to be performed under a contract. Section 205(b)(1). In view of the (1) serious penalties for failure to disclose relevant facts and (2) ambiguity of the term "anticipated interests," this provision is unreasonable.

-- The requirements of section 205 apply not only to instances of organizational conflicts of interest, but also to the "appearance" of a conflict of interest. Section 205(d),(e),(f) and (g). If an agency determines that no actual conflict exists, it is not reasonable to debar contractors from an award based on an "appearance."

-- If, after the award of a contract, a conflict of interest arises, an agency must either terminate the contract or make public a complete statement of all the relevant facts. Section 205(g)(1). This requirement may result in the public disclosure of highly confidential business information and the disruption of Federal programs.

-- An agency may not waive the conflict of interest strictures unless it (1) determines that to do so would be in the interest of the Government and (2) makes public a complete statement of the relevant facts. Section 205 (F)(3), 203(7). Here again, the bill may result in public disclosure of proprietary information and the disruption of Federal programs.

-- Contractors who are damaged by arbitrary, capricious, or even fraudulent conflicts of interest determinations may only claim compensation for work performed under a terminated contract. Section 205 (g)(2). This is an arbitrary and punitive measure and has no relation to any of the Governmental interests the bill seeks to protect.

The organizational conflict of interest provisions of S. 719 contain none of the realistic provisions set forth in OFPP's proposed FAR. For example, the proposed FAR encourages the exercise of common sense and good judgment, cautions contracting officers not to create burdensome informational requirements, uses the phrase "avoid, neutralize, or mitigate

potential conflicts," allowing flexibility in approach, and directs contracting officers to examine the nature and importance of relationships between contractors and their clients, as well as internal controls to avoid bias, before deciding that a potential conflict of interest exists.

Section 206. Budget Identification and Justification:

Section 206 of the bill would inhibit the President from determining the form, detail, and presentation of his budget request to Congress. This would be contrary to the intent of the Budget and Accounting Act of 1921, and we object to this Section on that basis.

We also object to legislating requirements for information that is already available. We do not object to providing necessary information; and the Budget and Accounting Act of 1921 clearly authorizes the committees of the Congress to request and receive such information as they may desire in their consideration of, and action upon, budget estimates (31 U.S.C. 581). If the committees request from the agencies the detailed information in section 206 of S. 719, we expect that it would be provided in accordance with OMB Circular No. A-10.

Finally, we do not believe that specific budget entries for consulting and management support services within the object classification schedules or by subfunction would produce the results intended by Congress.

Section 207. Federal Procurement Data System: Because categories of "professional type services" and "commercial and industrial type activities" are not mutually exclusive, classifying all procurement actions as one or the other would yield meaningless data. Further, the FPDS already provides much more detailed and comprehensive information on all procurement actions over $10,000. The product and service codes for the FPDS provide 38 classifications of special studies and analyses and 16 classifications of management and professional services. In fact, the information that would be required by section 207(b)(1) - (13) is already available from the FPDS.

Section 208. Public Availability: In general, we do not object to making contracts available to the public. This information -- with certain restrictions -- is already available under the Freedom of Information Act; however, we see no reason to place on the agencies the additional burdensome paperwork requirements this section contemplates.

Finally, section 208(b)(1)(B) asks for the names and qualifications of key personnel in a contract. This information is considered to be proprietary and is currently withheld from public disclosure by Federal agencies.

United States
Office of
Personnel Management
Washington, D.C. 20415

In Reply Refer To Your Reference

AUG 18 1981

Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the Office of Personnel Management's (OPM) views on S. 719, a bill "To amend section 3109 of title 5, United States Code, to clarify the authority for the appointment of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, and for other purposes."

This bill seeks to reform agency use of consultants by changing both the personnel laws (title I) and the contract procurement laws (title II) under which agencies are authorized to acquire consulting services. It would add a number of disclosure requirements and protections against conflict of interest in agencies' use of consultant services to prevent abuses identified during Congressional hearings and General Accounting Office (GAO) investigations.

The Office of Management and Budget (OMB) is responsible for setting overall executive branch policy for procurement and contracting out and has initiated administrative actions to deal with problems this legislation would address. We are aware that OMB opposes enactment of S. 719 and we defer to OMB in that regard. Our comments are primarily on the employment aspects in Title I.

We believe Title I of S. 719 is a substantial improvement over S. 2880, the predecessor bill in the last Congress. OPM's legislative proposal to improve section 3109 was introduced as S. 2506 last year. We are glad to see a number of OPM's recommendations incorporated into the new bill.

Title I would amend 5 U.S.C. 3109 the general authority for agencies to use experts and consultants as Federal employees. Section 3109 is a source of longstanding problems including confusion between employment and contracting, lack of a central oversight agency, absence of basic definitions for expert and consultant, and a proliferation of related statutory authorities. We strongly favor legislative actions to cure those problems, and welcome receiving the authority to enforce section 3109.

Section 101(a) would add to or revise the subsections of section 3109. As proposed, revised subsection (a) would change the cited definition of "agency" from section 5721 to section 552(e). This change would add Government controlled corporations to the coverage of section 3109, but would remove those judicial and legislative branch agencies which now are covered. We are concerned because the present definition is of long standing, because the revision would remove the authority (and restrictions) from some agencies and confer it on others, and because Government controlled corporations operate under many special laws outside the civil service system. Accordingly, in the absence of information showing a need for a particular change, we do not favor a revision to agency coverage.

Subsection (b) would retain the present requirement for each agency to have a separate statutory "triggering" authority before it can use the general authority of section 3109. We recommend dropping this requirement. Neither S. 2506 nor S. 2880 contained it. It has become almost commonplace to grant the required authorization. It does not serve as a control because, as far as can be determined, every agency has the authority. Over sixty triggering authorities appear in individual agency permanent legislation, and others appear every year in appropriation acts. The General Accounting Office some time ago recommended simplifying the section to provide a self-contained authority for hiring experts and consultants by eliminating the requirement for authorizing language in organic or appropriation acts. Elimination of the need for separate statutory authority in no way would preclude Congress from placing appropriations or other limitations on an agency's use of experts and consultants.

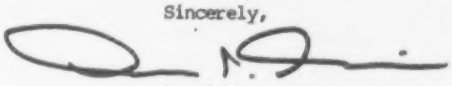
Subsection (e) would require agencies to tell OPM the number of days worked and the amount of pay received by each appointed expert or consultant. While we have not sought authority to collect this particular information, we understand it could be provided from agency payroll systems. For clarification and in order not to preclude our collecting other data from agencies, the first sentence should be changed to read "Each agency making appointments under the authority of subsection (b) of this section shall provide such information and reports as the Office of Personnel Management requests, including ...". Also, the wording in (e) (1) "... during the period was so employed..." should be revised to read ".....during the period actually worked..." since some employees work only on an intermittent basis.

Title II would add a number of requirements aimed at publicizing and controlling procurement contracting activities, an area of primary concern to the Office of Management and Budget.

We are concerned about the sweeping language in section 205. We can appreciate the attention of Congress to organizational conflicts of interest. However, by discouraging agencies from contracting with anyone who had "past, present or anticipated interests that either directly, or indirectly through a client relationship, relate to work to be performed", the bill severely restricts access to private sources who are most likely to have the skill and experience to do the job. Virtually, any involvement could be argued to be a basis for a potential conflict of interest. Further, the wording is so broad as to be susceptible to court challenges by contractors.

The Office of Management and Budget advises there is no objection from the standpoint of the Administration's program to submission of this report.

Sincerely,



Donald J. Devine
Director

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

AUG 28 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Re: S. 719, the "Consultant Reform and Disclosure Act of 1981"

Dear Senator Roth:

In response to your request, I am enclosing a memorandum setting forth the Commission's comments on S. 719, the "Consultant Reform and Disclosure Act of 1981." I hope these comments will be useful to your Committee in its consideration of the bill. If you have any specific questions, please contact Alan Rosenblat of our staff at 272-2428.

The views expressed in the enclosed memorandum are those of the Commission, and do not necessarily represent the views of the President. We are simultaneously sending copies of this correspondence to the Office of Management and Budget. We will inform you of any advice received from that Office concerning the relationship of these materials to the program of the Administration.

Thank you for giving us the opportunity to comment on this legislation. We would appreciate the opportunity to make further comments on it if it is substantially modified in any respect.

Sincerely,

John S.R. Shad
Chairman

Enclosure

cc: Mr. Robert Carlstrom
Office of Management and Budget

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION TO THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS ON S. 719

The Commission is pleased to have this opportunity to comment on S. 719, the "Consultant Reform and Disclosure Act of 1981." The bill would amend Section 3109 of Title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants by federal agencies, and also would provide statutory guidelines concerning the awarding by such agencies of contracts for the procurement of goods and services from consultants and other contractors. As you may be aware, the Commission previously commented on a similar bill, S. 2880, in response to a request by the then-Chairman of your Committee, Senator Abraham Ribicoff. As we pointed out in those comments, the Commission is a small agency with few contracting responsibilities, and we have no comments with respect to many of the bill's provisions. However, we do wish to comment on a few areas of concern to us. In brief, we support the goals of the bill but have serious reservations whether the detailed procedures of the bill are necessary in order to achieve those goals, at least with respect to the Commission.

One of the main purposes of the bill is to require agencies to transmit certain information regarding their contracting activities to the Secretary of Commerce for publication, to the Office of Management and Budget ("OMB") for inclusion in appropriations requests, and to the Administrator for Federal Procurement Policy for the establishment of a data system on the procurement activities of government agencies. 1/ As we pointed out in our comments on S. 2880, we believe the information-gathering requirements imposed by the bill would require considerable duplicative effort on the part of agencies, and consequently might impose paperwork burdens not justified by the benefits of the effort involved. We note that S. 719 is somewhat less burdensome than S. 2880

1/ Sections 101(a), 202(a), 206(a), 207(c).

in this regard, in that the new bill does not contain the prior proposal's requirement, in Section 202(c), that agencies transmit details about modifications of contracts to the House and Senate Committees on Appropriations. However, despite this change, we believe the bill could be improved by requiring agencies only to submit contract information to one central source. In this connection, it is important to note that the Commission currently is required to submit extremely detailed quarterly reports, containing approximately 300 reporting elements for each contract in which we enter to the Federal Procurement Data Center, a component of the Office of Federal Procurement Policy. We believe the current reporting requirements are adequate, and if the bill's provisions are designed to add to those requirements, we believe the added burden on agencies would not be justified.

In addition, Section 208(b) of the bill provides that, except for national security reasons or where disclosure is prohibited by law, all government contracts and certain information pertaining to them shall be available to the public, except for "technical proposals." This provision differs from the analogous provision in S. 2880, Section 203(b) which provided that such information shall be publicly available "notwithstanding any other provision of law."

We believe this change is an important improvement of the bill, in that it affords protection to sensitive commercial information that is protected from disclosure by the Trade Secrets Act, 18 U.S.C. § 1905. In our opinion, however, the provision still does not provide adequate protection for other types of confidential information. For example, as we pointed out in our comments on S. 2880, the Commission has contracted for development and implementation of sophisticated surveillance systems that monitor portions of the securities markets. The contracts for these systems disclose how the systems operate and the parameters used in determining the existence of possible violations of the federal securities laws. Making this information public could permit potential violators to circumvent the surveillance systems, thereby reducing the systems' effectiveness.

Thus, we believe that Congress should expand the exception in Section 208(b) to exclude matters whose disclosure could be detrimental to an agency's program.

We also have the same concern with Section 205 of S. 719 as we had with a similar section of S. 2880. This section requires disclosure of, and provides procedures to remedy, conflicts of interest by contractors or persons proposing contracts with government agencies. However, the area of conflicts of interest has been extensively explored by OMB, which has proposed detailed guidelines and other explanatory materials that inform agencies of the dangers, and their solutions. In addition, with respect to considerations not addressed by the OMB guidelines, the Commission, as a matter of course, includes clauses in all consultant contracts to ensure that conflicts of interest will not harm the Commission's interests. We understand that other agencies also include such clauses in their contracts. In the absence of extensive legislative hearings on this matter, it may be appropriate for Congress to defer to the experience of OMB and the practice of the agencies, and allow the existing guidelines to provide guidance to agencies. 2/

We also have concerns with several of the bill's provisions that impose rather heavy administrative burdens on agencies that enter into contracts, without providing what we perceive to be corresponding benefits in return. For example, the requirement of Section 202(a) that an agency submit a notice of intent to form a contract to the Secretary of Commerce is burdensome and ambiguous, because it is difficult to know at such an early stage

---

2/ With regard to Section 205, we also have a more technical point. The new bill, unlike S. 2880, contains a provision, Section 205(a), that apparently limits the applicability of the conflict-of-interests provisions to the Departments of Energy and Transportation, and the Environmental Protection Agency. However, as the section is drafted, its meaning is ambiguous. We suggest that the word "only" be inserted after the word "applies," in Section 205(a), to clarify this point.

exactly what the contract's terms will be. Some agencies do currently publish such advance notices, where a specific reason exists to do so. However, to require such notice in all cases would appear to serve no useful purpose. Similarly, the requirement of Section 203(6) to disclose the names of all employees under the contracts who "substantially contributed" to any report, and the requirement of Section 204 that the agency prepare a detailed evaluation of the performance of each contract, would absorb considerable staff resources without adequate justification in terms of benefits to the public.

In sum, we believe that, at least with respect to the Commission, the new procedures established by the bill would create extremely burdensome demands on our procurement staff, without providing meaningful additional protections to taxpayers. In the current budgetary situation, which requires our staff to operate under rather severe manpower restraints, the requirement to divert the resources necessary to comply with the procedures mandated by Title II of the bill would have a severe impact on the ability of our procurement staff to carry out its functions effectively. Although the Commission does employ a significant number of consultants for specific projects, we believe the procedures that we currently follow are quite adequate to vindicate the policies that Congress has declared as the basis for the bill. In addition, we believe that the consulting contracts entered into by the Commission are not of such a magnitude as could lead to the abuses in their awarding or executions that the proposed legislation is designed to avoid. If despite our comments your Committee still favors this legislation, a partial solution to this problem would be to increase the thresholds for reporting to the Secretary of Commerce under Section 202(a), and performance evaluation under Section 204 from $10,000 and $50,000 to $25,000 and $100,000, respectively.

AW/cc/108

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

SEP 14 1981

SEP 11 1981

Honorable William V. Roth
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Small Business Administration regarding S. 719, a bill "To amend Section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, and special studies and analyses, and for other purposes."

S. 719 seeks to reform agencies' use of consultants by amending both the personnel laws (Title I of the bill) and the contract procurement laws (Title II of the bill), under which agencies are authorized to acquire consulting and related services. The bill would add a number of disclosure and other requirements to guard against potential conflicts of interest in the use of consulting and related services by Federal agencies.

In summary, we oppose enactment of S. 719. Although the bill would update and clarify certain provisions of 5 U.S.C. § 3109 (employment of individual experts and consultants), something we agree that ought to be done, it also seeks to impose through legislation management controls on certain government contracting activities that already exist. The legislation is unnecessary to the extent it concerns Federal contracting, because recent initiatives of the Office of Management and Budget will accomplish the results that S. 719 is designed to achieve.

The Office of Management and Budget will be furnishing you with a more detailed statement setting forth the Administration's position on this bill. We, of course, concur with that position.

Sincerely,

Peter A Tucatall

Michael Cardenas
Administrator

86-956 O - 82 - 13

american
consulting engineers
council

1015 FIFTEENTH STREET, N.W., WASHINGTON, D.C. 20005 □ (202) 347-7474
Telex: 897445 AMCONENGRS WSH

October 2, 1981

The Honorable John C. Danforth
Chairman
Subcommittee on Federal Expenditures,
Research and Rules
Senate Governmental Affairs Committee
44 Capitol Hill Apartments
Washington, D.C. 20510

Dear Senator Danforth:

The American Consulting Engineers Council (ACEC) is pleased to have the opportunity to present our view concerning S. 719, "The Consultant Reform and Disclosure Act of 1981."

During consideration of the consultant reform issue in the 96th Congress, ACEC encountered some confusion with regard to the distinction between consulting engineers and all other categories of consultant services. As this issue is addressed in this Congress, ACEC wants to make this important distinction clear.

The procedure for government procurement of architect-engineer (A-E) services is mandated by P.L. 92-582 (the Brooks Law). The Brooks Law expressly declares it to be the policy of the federal government to negotiate contracts for A-E services on the basis of demonstrated competence and qualifications for the type of professional services required at fair and reasonable prices.

In establishing guidelines for the use of consulting services (OMB Circular A-120, including the definition used in Bulletin 78-11), the Office of Management and Budget recognized the statutory provisions for A-E procurement and specifically excluded A-E services and other associated services directly related to a particular structure.

ACEC strongly opposes enactment of S. 719 for two reasons:

First, S. 719 does not make any distinction between consulting engineers and consultants. In fact, A-E services...are not mentioned at all. Section 201, defining "special study or analysis" includes studies and analyses which could be undertaken by consulting engineers. (section 201, parts (ii) and (iii) are all applicable except legal or litigative, legislative, regulatory or socioeconomic studies).

ACEC maintains that the Brooks Law procedures for selection of A-E services assures a quality product at fair and reasonable prices. This procedure applies to all procurement of A-E services, however, if enacted, S. 719 would supersede the Brooks Law. ACEC opposes this.

Second, ACEC believes S. 719 is unwarranted because executive branch directives have already established guidelines for the use of consulting services. This legislation only serves to duplicate these guidelines.

In short, ACEC opposes S. 719 because it could undermine the established and accepted method in the selection of architect-engineer professional services and it would duplicate executive branch directives already in place.

Thank you again for the opportunity to present ACEC's position on S. 719.

Sincerely yours,

William J. Birkhofer
Director
Governmental Affairs

WJB:mo

STATEMENT

of the

AMERICAN MEDICAL ASSOCIATION

to the

Subcommittee on Federal Expenditures, Research and Rules
Committee on Governmental Affairs
United States Senate

RE: S. 719, "Consultant Reform and Disclosure Act of 1981"

October 9, 1981

The American Medical Association takes this opportunity to comment on S. 719, the "Consultant Reform and Disclosure Act of 1981."

As the Committee is aware, use of consultants by the federal government has been a matter of concern for some time. A 1980 GAO report indicated that between 1960 and 1980 the GAO completed over 30 audit reports identifying the need for nearly every federal agency to manage use of consultants better. In fact, the GAO found that many of the problems that existed in the early sixties still exist today.

The consultant reform issue received a great deal of attention in late 1979 and early 1980 during hearings in both the House and Senate.

Problems uncovered by the GAO, the Congressional hearings, and press investigations include the following:

- inadequate standards of qualification for consultants;
- lack of identification of consultant costs in agency budgets;
- use of consultants to avoid hiring limits; conflicts of interest; unnecessary and unused consultant studies;
- inappropriate use of consultants to perform functions which government employees should be capable of fulfilling;
- awarding of consultant contracts at the end of a fiscal year;
- absence of competition in awarding consulting contracts;
- favoritism in contract awards;
- lack of monitoring of consultant contracts once awarded; and
- duplication of contract consultant work.

The American Medical Association is concerned about this issue and has prepared draft consultant reform legislation. A copy of this draft bill is attached to this statement. The draft bill includes many of the provisions contained in S. 719 and other items that we will comment on later in this statement that we believe should be included in any consultant reform legislation.

The enactment of S. 719 along with the additional items addressed in our draft bill would represent a constructive step forward in resolving many of the problems identified above.

With regard to appointed consultants, the bill would establish standards of qualification for appointed experts and consultants, would require agencies to report on the number of days each appointed consultant and expert was employed and the amount paid by the agency to such appointees, and would require establishment of procedures to determine the need for appointed consultant and expert services. We support these

measures but would suggest that the procedures established to determine need for consultants also include procedural safeguards to assure that those designated as consultants are in fact qualified. With regard to the use of contract consultants, the bill would seek to foster greater competition in awarding consultant contracts by requiring the publication of contracts exceeding $10,000 in the "Commerce Business Daily." In view of estimates that competition saves 20% on the price of a contract and that in 1979 16,101 research and consulting contracts were awarded without competition, this provision should result in significant savings to government agencies.

The bill provides that within 120 days of the completion of any contract for consultant services that exceeds $50,000, the agency must prepare a written evaluation of the contractor's performance. While this provision would help to assure that consultant work product undergoes more post-performance evaluation, we believe that a lower dollar threshold for post-contract evaluation would be advisable in light of the number of unused or ignored consultant studies. In addition, we would recommend that, as to long-term contracts, a provision be added to the legislation providing for monitoring of the contract during the contract period so that evaluation is not limited to looking at the work after it has been completed.

The bill contains provisions to disqualify from consideration in contract awards those consultants who have a conflict of interest or who may give the appearance of having a conflict of interest. We support this provision but question its limitation to only three agencies: the

Departments of Energy and Transportation and the Environmental Protection Agency. We do not believe that a matter as fundamental as assuring the absence of conflict of interest in consultant contracts should be limited to only these three agencies. Furthermore, we question the desirability of limiting the duration of this provision to only three years.

S. 719 would provide for agencies to identify in their budget requests amounts to be used for procurement of consultant services. Given the absence of such information at present, this provision should prove helpful to gain a better overview of the extent of government consultant use and can serve as a management tool to prevent overuse of consultants.

The creation of the federal procurement data system to collect and disseminate information regarding agency consultant contracts should also help in monitoring and controlling consultant use. Agencies can thus survey the information provided in this data system prior to soliciting consultant contracts in order to determine whether the same study has already been prepared for another agency. This could, of course, be of great assistance in lessening the problem of duplication of consultant contracts.

Additional Suggestions:

1) To provide an additional check on agency overuse of consultant services, we recommend that a provision be added to the bill providing the Office of Management and Budget with the authority to disapprove any consultant contract exceeding $50,000.

2) A concern not addressed by S. 719 is the use of appointed consultants to avoid hiring limits and freezes. A provision could be added to link appointment and contracting of consultants to any personnel ceiling or freeze that may be in effect. One approach would be to have a consultant represent a fraction of a full-time civil worker for purposes of personnel ceilings.

3) The 1980 GAO report found that agencies are awarding a disproportionate number of consulting service contracts in the final quarter of the fiscal year to avoid having to return unspent procurement funds to the Treasury. The GAO believes that this "rush" to award contracts in the final quarter can seriously impair the objectivity as well as the thoroughness of the proposal process. We would recommend, therefore, that a provision be added to S. 719 that would prohibit agencies from obligating more than 15% of their annual consultant procurement budget in the last two months of a fiscal year.

4) Some of the abuses reported in awarding consultant contracts include contractors giving items of value to federal procurement officials. The Committee may wish to review applicable law to assure that appropriate penalties exist for anyone giving or receiving any item of value in connection with an attempt to obtain favorable action on a contract award.

Conclusion

Consultant reform is an important issue involving the efficiency and integrity of federal agency operation. In addition, the budgetary concerns of today and the growing realization of the need to attain a balanced federal budget require that every attempt be made to reduce unnecessary expenditures to enable beneficial government activities to continue. We believe that the reforms contemplated in S. 719 and those additional suggestions that we have made would produce a more efficient and cost-effective approach in government consultant use. We urge the Committee to carefully consider the views expressed above on this matter.

0169p

June, 1981

CONSULTANT REFORM BILL

The following bill is designed to curb abuses in government use of consultants by establishing procedures to assure that consultants that are appointed or contracted to work for a government agency have the necessary qualifications to perform the work, to require that consultants costs be identified in agency budgets and to correct other problems involved in government use of consultants.

Specifically, the draft consultant reform bill would do the following:

- require that each government agency establish a Consultant Review Board to review and approve consultant contracts and appointments, to assure that the consultants are qualified, that there is a need for consultant work to be performed, that the work cannot be performed by the regular employees of the agency, that the consulting work has not already been performed by another consultant, and to monitor consultant services that have been approved;
- require that budget requests submitted by an agency include an identifiable amount for consultant costs;
- prevent the use of consultants to avoid hiring limits;
- establish procedures to disqualify consultants who have conflicts of interest;
- limit agency spending for consultants in the last two months of a fiscal year;
- require publication of proposed consultant contracts to provide for greater competition; and
- establish criminal penalties for acts of favoritism in the awarding of consultant contracts.

- American Medical Association -
Department of Federal Legislation, Division of Legislative Activities

97th Congress
1st Session

DRAFT

Bill No. _____

IN THE (SENATE) (HOUSE) OF THE UNITED STATES

Date _____

__ _____ of _____ introduced the following bill;
which was read twice and referred
to the _____ Committee

A BILL

To amend Section 3109 of Title 5, United States Code, to provide for standards of qualification for consultants, to provide for the identification of consultants costs in agency budgets, to provide for the disclosure of conflicts of interest, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS

Section 1. The Congress finds and declares that--

a. The lack of federal statutory provisions establishing standards of qualification for consultants has led to government agencies procuring the services of unqualified consultants;

b. The lack of precise knowledge of the amount of federal government spending on consultant services creates barriers to dealing effectively with abuses in the use of consultants and disguises the extent and nature of consultant use;

'c. Agencies subjected to personnel ceilings or hiring freezes can still obtain extra manpower through the expenditures of funds for consultants;

d. There have been many instances in which consultants have conflicts of interest which negate the desired objectivity in preparation of the contracted-for work; reports prepared by such firms with financial self-interest often go unquestioned by the contracting agency;

e. Many consultant contracts costing millions of dollars have been awarded to perform work that is unnecessary, resulting in the preparation of reports and studies which are not used by the agency.

f. Consultants are used for functions which government employees in the civil service should be capable of handling; consultants have been used to write federal regulations, draft legislation, prepare agency budget requests, write reports to Congress and Congressional testimony, answer mail from the public and Congress, prepare agency organizational charts and job descriptions, and even prepare the basic components of their own contracts;

g. Millions of dollars of unnecessary consultant contract awards are made in the last days of the government's fiscal year in order to use unspent agency funds rather than return such funds to the Treasury;

h. There is often an absence of competition in awarding consultant contracts, despite estimates that competition saves 20% of a contract's price;

i. Once a contract has been awarded there is often little or no monitoring done by the agency to assure that the services contracted for are in fact being performed;

j. There have been many instances of duplication of efforts where the same tasks are being performed by different consultants.

Section 2. Section 3109 of Title 5, United States Code, is amended to read as follows:

"Section 3109. Employment and Contracting of Consultants

(a) Definitions

(1) 'agency' has the meaning given it by Section 552(e) of this title.

(2) 'consultant' means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliate thereof which provides advisory services to an agency or contracts for the preparation of reports for an agency.

(3) 'appointment' means the temporary or intermittent (less than one year) non-contract employment of a consultant at a rate of pay not in excess of the basic rate of pay payable for GS-18.

(4) 'contract' means a written agreement, including amendments and modifications thereto, between the government and a consultant for the procurement of goods or services.

(5) 'report' means a study, plan, evaluation, analysis, manual, oral or written presentation.

(b) Authorization for Consultant Use

The head of an agency may procure by contract or appointment the services of a consultant without regard to

(1) the provisions of this Title governing appointment in the competitive services;

(2) chapter 51, subchapter III of chapter 53 and chapter 54 of this title (relating to position classification and pay rates).

(c) Consultant Review Boards

Each agency head shall appoint a Consultant Review Board consisting of three members: a person who is an expert in the subject matter of the agency activity who is not an employee of the federal government, a person who is experienced in government services procurement, and an official of the agency. No person may serve on the Board if he engages in consultant work currently or within the past two years has had a financial interest in any consultant firm. The Board shall meet on a monthly basis and perform the duties listed in paragraph (d).

(d) Duties of Consultant Review Board

Each agency's consultant Review Board shall perform the following responsibilities:

(1) Appoint an employee of the agency to serve as the Board's Executive Director. The Executive Director shall be provided with sufficient staff to implement the responsibilities of the Consultant Review Board.

(2) Review each proposed consultant contract and proposed consultant appointment and determine whether it should be approved or disapproved.

(3) Administer and enforce, through the approval process, Standards of Qualifications for consultants. Each agency Board shall develop its own Standards, and such Standards shall be developed to assure that only consultants who are qualified to perform the services needed are approved. The Board shall only approve those consultant contracts and appointments that comply with the Standards of Qualification.

(4) Prior to approving any consultant contract or appointment, the Board shall make a written determination that the need for the consultant services is clearly warranted with a written explanation of why the work cannot be done by the regular civil service employees of the agency.

(5) The Board shall not approve any consulting contract or appointment to produce services which are being or have been substantially performed under another contract with the agency or another agency.

(6) The Board shall submit any consultant contract that it has approved that has an estimated cost of over $50,000 to the Office of Management and Budget for approval. If the Office of Management and Budget does not concur in the Board's approval, the Board shall rescind its approval.

(7) The Board shall establish procedures to assure regular monitoring of consultant work. These procedures shall include a requirement that written quarterly progress reports be filed with the Board by all appointed and contract consultants.

(8) The Board shall determine whether a conflict of interest (as defined in Paragraph (1) of subsection (e)) exists with regard to a proposed consultant contract or appointment and shall not approve any contract or appointment where such conflict is found to exist. The Board shall make such determination after evaluating information provided pursuant to Paragraph (2) of subsection (e).

CONFLICT OF INTEREST

(e) For purposes of this section--

(1) the term "conflict of interest" means any relationship or situation in which a consultant has past, present, or currently planned interests that either directly, or indirectly through a client relationship, relate to the subject of work to be performed under a contract and which--

(A) may diminish the capacity of the consultant to give impartial, technically sound, and objective assistance and advice; or

(B) may result in an unfair competitive advantage to the consultant; except that such term does not include the normal flow of benefits from the performance of the contract.

(2) Whenever a consultant submits a proposal for a contract, he shall include with such proposal and submit to the agency's Consultant Review Board--

(A) a statement which discloses all relevant facts relating to any existing or potential conflict of interest concerning the contract; or

(B) a statement certifying, to the best knowledge and belief of such consultant, that no relevant facts exist relating to such an existing or potential conflict of interest.

BUDGET IDENTIFICATION AND JUSTIFICATION

(f) The head of each agency shall include with the request for regular appropriations for each fiscal year submitted to the Director of the Office of Management and Budget pursuant to Section 215 of the Budget and Accounting Act (31 U.S.C. 23) an itemized statement of the amounts requested by the agency for the procurement of consultant services and salaries of appointed consultants in such fiscal year.

(g) The Budget transmitted by the President to the Congress for each fiscal year under Section 210(a) of the Budget and Accounting Act, 1921 (31 U.S.C. 11) shall set forth separately, within each subfunctional category used in such budget, requests for new budget authority for, and estimates of outlays by, each agency for appointed consultants salaries and (specified separately) contracts for the preparation of consultant reports.

86-956 O - 82 - 14

HIRING CEILINGS AND FREEZES

(h) The appointment of consultants shall be subject to the same agency personnel ceilings that apply to the hiring of civil service employees. When a Presidentially-ordered federal job freeze is in effect, any agency to which such freeze applies shall not appoint any consultants for the duration of the freeze.

PUBLICATION OF CONTRACTS

(i) Notwithstanding any other provision of law, as soon as practicable after an agency determines that it may need to enter into a consultant contract in an amount in excess of $10,000, the agency shall transmit to the Secretary of Commerce a written notice describing such contract. The Secretary of Commerce shall publish each notice received pursuant to this subsection in the daily publication "United States Department of Commerce Synopsis of the United States Government Proposed Procurement, Sales, and Contract Awards."

PUBLIC AVAILABILITY

(j) (A) Every agency shall maintain during each month a list of consultant contracts which were entered into within the preceding 24 months or for which contractors have not then completed performance. Such list shall include--

(I) the contract identification number assigned by the agency;

(II) the ~~contractor~~'s name;

(III) the date ~~of~~ award and the initial and current ~~estimated~~ completion date;

(iv) the initial and current amount of the contract award;

(v) a brief description of the work to be performed; and

(vi) the name of the Government employee who authorized the award of the contract and the employee who is responsible for the program administration of the contract.

(B) The list under paragraph (1) shall be available to the public for inspection and copies shall be available but the agency may charge for duplication costs therefor.

FAVORITISM PROHIBITED

(k) Any person who offers anything of value for the purpose of attempting to achieve favorable action on a consultant contract or appointment decision, and any person involved in evaluating or approving a proposed consultant contract for appointment who receives such item of value, shall be subject to a fine of not less than $10,000, one year imprisonment, or both.

LIMITATION ON EXPENDITURES

Section 3. Section 665 of title 31 of the U.S. Code (as amended) is amended by adding at the end thereof the following paragraph:

"(5) In exercising apportionment authority under this section for the fiscal year ending September 30, 1981, and each of the following two fiscal years, the Director of the Office of Management and Budget shall insure that no more than 20

per centum of the total appropriations made available for each agency for any such fiscal year for procurement of consultant services may be obligated during the last two calendar months of such fiscal year."

PERFORMANCE APPRAISAL

Section 4. (a) Section 4313 of title 5, United States Code, is amended by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively, and by inserting after paragraph (3) the following new paragraph:

"(4) compliance with rules, regulations, and procedures applicable to the contracting out of agency functions, and furtherance of the policy set forth in section 3109 of title 5, United States Code."

(b) Section 5402(b)(2)(B) of title 5, United States Code, is amended by striking out "and" at the end of clause (iii), by redesignating clause (iv) as clause (v), and by inserting after clause (iii) the following new clause:

"(iv) compliance with rules, regulations, and procedures applicable to the contracting out of agency functions, and furtherance of the policy set forth in section 3109 of title 5, United States Code."

STATEMENT
on
CONSULTANT REFORM and DISCLOSURE ACT of 1981 (S. 719)
for submission to the
SUBCOMMITTEE ON FEDERAL EXPENDITURES, RESEARCH & RULES
of the
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
for the
CHAMBER OF COMMERCE OF THE UNITED STATES

by
Mark Schultz*
September 25, 1981

On behalf of the more than 170,000 members of the Chamber of Commerce of the United States, I wish to express our views on S. 719, the Consultant Reform and Disclosure Act of 1981. Unless it is amended, we will oppose this legislation.

The U.S. Chamber is the largest business federation in this country, representing more than 166,000 business firms, 2,700 chambers of commerce in this country and abroad, and 1,300 trade and professional associations.

A majority of these 166,000 business firms are small businesses. In fact, more than 97 percent of our member companies employ fewer than 500 persons, almost identical to the percentage of small businesses in the total economy. More than 60 percent of our members employ fewer than 20 persons, and more than 40 % have less than 10 employees.

In view of these figures, it is fair to say that the U.S. Chamber represents the interests of American business, large and small, many of whom do business with the federal government. Accordingly, we clearly have a vital stake in eliminating the obstacles to and burdens of doing business with the federal government via the procurement process.

---

* Director, Federal Procurement Policy

Federal Procurement Policy: Reliance on the Private Sector

The U.S. Chamber recognizes the significance of any proposed changes in federal procurement policy, which now involves more than one-tenth of the federal budget. Government procurement has a major effect on the nation's businesses, their employees, government employees, and on a broader level, all American taxpayers. The policies ultimately adopted not only affect immediately the expenditure of $65 billion or more in taxpayers' money each year, but also guide the government's procurement activities for years to come.

In view of the above, it would be difficult for us to overstate the importance of close Congressional scrutiny of the total impact of any proposed changes to ensure that they do, in fact, contribute to the nation's longstanding policy of reliance on the private sector for needed goods and services.

History of Current Procurement Policy

The longstanding federal procurement policy has been, and continues to be, that the government should rely on the private sector for needed goods and services.

In 1932, the first study into the matter was made by a special committee of the House of Representatives. Numerous Congressional studies and commissions also have examined the problem in subsequent years.

However, our current procurement policy was not set forth until 1955, when the Eisenhower Administration issued a directive that the government should not provide services that put it in competition with private industry.

That policy was reaffirmed during the Johnson Administration by Circular A-76, issued by the Bureau of the Budget, predecessor of the Office of Management and Budget (OMB) (the Circular is now referred to as OMB Circular A-76).

Circular A-76 reiterated the government's general policy of reliance on the private enterprise system to supply its needs. It established the rule that goods and services were to be acquired from the private sector whenever feasible; the exception was to provide them in-house using federal employees.

Circular A-76 established new criteria for continuing or terminating in-house activity. It further provided that a government commercial or industrial activity may be authorized to provide goods or services only under certain conditions.

Advantages to Contracting Out

Circular A-76 was conceived in recognition of the major advantages of "contracting out" -- its cost-effectiveness, the flexibility it provides with regard to manpower and changing priorities, and its ability to increase technology transfers.

In most cases, the American taxpayer gets a much better deal under competitive contract than when functions are performed in-house. Procurement experts have estimated that competitive contracts can reduce costs by as much as 25 to 50 percent.

For example, according to the Office of the Secretary of Defense, for Fiscal Years '79, '80, and part of '81 DOD has conducted cost comparisons between in-house commercial activities and competitive contract performance. In 270 of these studies, contract performance was shown to be more economical and contracts were awarded, producing savings of $209 million. In the other 158 cases, and with the incentives of job competition, in-house performance was shown to be more cost-effective, reducing costs by $95 million.

Contracting out, besides being more economical, also provides government managers with a greater degree of flexibility. Contracts can be awarded, terminated, and reopened to provide needed goods and services at the lowest cost; not so with a government facility or work force. The very nature of government and bureaucracy, with the attendant civil service regulations, make reductions in force -- after a function is completed -- difficult if not impossible. While government priorities change and shift constantly, federal employees hired for one purpose remain on the government payrolls years after the project for which they were hired has been completed; not so with contracted employees.

Finally, when government research is performed by private firms, its application to civilian markets is accomplished more quickly. For example, the National Aeronautics and Space Administration's (NASA) space program, which relies heavily on private sector research firms, has provided us with many useful consumer products.

It is essential that procurement policies and programs designed to further this progress in scientific knowledge and application take full advantage of the research capabilities and technical competency of private enterprise. Greater progress will be made by more fully utilizing the capabilities of private enterprise than by establishing or expanding government facilities in competition with them.

Implementation of Current Policy

However, as noted at the outset, over the past few years OMB Circular A-76's policy of reliance on the private sector effectively has been ignored.

Circumvention of this policy has been achieved through loose agency constructions of what is or is not a "governmental function." Under OMB Circular A-76, purely "governmental functions" are to be performed in-house. This exception to reliance on the private sector has provided agencies with "justification" for many of the activities performed by federal employees.

Threatened disruption, delays and degradation of service resulting from possible strikes by private sector unions is an often-cited reason for not contracting out important commercial or industrial functions. But, where strikes have occurred, rarely has degradation of service been experienced. Moreover, no longer can government union officials claim exemption from possible strike activity, in the wake of the threatened walk-out by postal officials and the actual strike by air traffic controllers.

Alleged abuses in the procurement system -- e.g., year-end spending, individual and organizational conflicts of interest, and sole-source contracting -- have led to calls for greater control over the so-called "beltway bandits" (i.e., consultants whose offices are located along the beltway surrounding Washington) and "invisible army of contracted employees." Unfortunately, this is a well-orchestrated movement which seeks to smear the private sector while expanding federal bureaucracy.

In fact, there is no sector of the economy with less control and accountability than government -- at all levels. Government accounting systems are oriented toward outlays and disbursements, not costs. No agency has a cost accounting system that rivals the cost accounting requirements for federal contractors. When an agency contracts for a product or service, there is a detailed accounting for all costs, in terms of the results provided. Conversely, when an agency performs a task in-house, there is control only over the number of employees and the total dollars expended -- but no control over, or accountability for, output.

Finally, critics of contracting out have made much of the large number of federal contractors and consultants. But the number of employees who may be involved in performance of federal contracts is immaterial; the fact that contract performance is more economical is the key point.

Preoccupation with the number of contract employees is irrelevant to the real issue -- economy in government. To begin with, there will never be a completely accurate account of contractors. Many are involved in providing the same product or service to private consumers; many contracts are awarded, and many others are completed each day. More significantly, most contracts are written in terms of the products or services to be provided and the cost to the government, not in terms of the number of people to be employed.

Federal Employee Union Pressure

Federal employee union pressure is most responsible for the current attitude toward contracting out.

These unions have taken a strong stance against contracts for work that could be performed by government employees. In addition, they have challenged the legality of "contract conversions", i.e., where a job previously performed by federal employees is contracted out, and have enlisted support from Members of Congress relative to agency decisions to award contracts.

The net effect of these lawsuits and protests is that agencies, understandably, are "gun shy" about awarding contracts or contract conversions.

The federal employee unions' tremendous influence has continued unabated because the business community and private sector unions have yet to exert a comparable countervailing influence.

Anti-Contracting Out Legislation

As a direct result of the federal employee unions' successful lobbying campaign, Congress over the past few years has placed moratoriums and more and more restrictions on contracting out. The Department of Defense (DOD) Appropriations Act for FY '78 contained a moratorium provision preventing contracting out of defense support functions.

In the 96th Congress, Section 502 of the DOD Authorization Act for FY '81 required detailed cost comparison studies which had to be certified by the Secretary of Defense and provided to Congress -- making DOD's ability to convert work being done by federal employees to more cost-effective private contracts increasingly more difficult. The House version of the Act also contained a provision allowing federal employees the right to seek judicial review and relief when contract awards "adversely affected" their jobs.

Contractors also witnessed the introduction of a "federal employee relief bill" (H.R. 4717) by then-Representative Herb Harris which would have had a chilling effect on contracting out. The Harris bill was designed to prevent federal agencies from contracting out to avoid personnel ceilings. Agencies would be required to reduce their in-house personnel by the number of those contracted to perform a function. If it were found to be more cost-effective to perform a function in-house but the agency did not have the necessary personnel, the agency could request OMB to raise its personnel ceiling to accommodate the need.

Faced with the choice of losing personnel by contracting out or acquiring personnel by keeping work in-house, it is easy to predict what most agency managers would choose to do -- i.e., not contract out.

In the 97th Congress, Sections 602 and 304 of the House-passed version of FY '82 DOD Authorization (H.R. 3519) interfere with OMB Circular A-76 policies governing contracting out and conversion of DOD work to private contract. Section 602 would require military commanders to certify that a "contract conversion" would not jeopardize mobilization capabilities. Section 304 would prohibit the contracting out of an entire medical facility. Both provisions fly in the face of A-76 and would establish bad procurement precedents.

Section 10004 of this year's House budget reconciliation bill, as reported out by the House Post Office and Civil Service Committee, contained a recodification of the Harris proposal outlined above.

The Schroeder (D-Colo.) Amendment to the proposed Department of Energy (DOE) National Security authorization bill for FY '82 (H.R. 3413) would overturn a contracting out award made by DOE for security services at the Los Alamos National Laboratory in New Mexico.

Finally, the most subtle attacks on contracting out have been the constant allegations of contract abuses leveled at private consultants and a wide range of professional, research, and technical services, resulting in a variety of procurement "reform" bills, including S. 719.

These recent initiatives underscore the urgent need for Congressional action to reaffirm and codify the sound policy of reliance on the private sector -- as contemplated by the Hayakawa-Dreier joint resolution (S.J. Res. 93, H.J. Res. 294), legislation the Chamber wholeheartedly supports.

Consultant Reform Act of 1981 -- What Does It Do?

S. 719 is patterned after similar legislation (S. 2880) introduced by Senator David Pryor (D-ARK) during the 96th Congress.

Under the new bill, any Department of Energy (DoE), Department of Transportation (DoT) or Environmental Protection Agency (EPA) consulting, management, professional service or special study and analysis contract would be evaluated by the conflict of interest office within the agency or department purchasing the contract to determine whether a conflict of interest exists.

The bill also includes the following provisions:

- Disclosure. Contracts in excess of $10,000 must be announced in the Commerce Business Daily prior to award. Also, notice of and justification for all subsequent modifications which increase the contract value by $25,000 must be sent to the Inspector General (or equivalent) of the awarding agency or department.

• Evaluation. Contracts over $50,000 must be evaluated, with special attention given to performance according to contract terms and cost and time deviations.

• Budget Approval. Agencies must forward to the OMB an itemized statement of their request for consultant contract funds in each fiscal year. The budget transmitted by the President to Congress must list each agency's consultant contract fund requests separately.

• Public Availability. Each agency must compile and make available to the public on a quarterly basis a list of all consultant contracts entered into by the agency in the preceeding twelve months. In addition, these contracts (except those classified for reasons of national security) are to be considered public documents and must be made available for public inspection. However, an agency is not required to make technical proposals available to the public.

Chamber Critique: S. 719

The observations outlined below represent the Chamber's reaction to the scope of S. 719 and its most important provisions. Among those issues deserving serious attention by the Subcommittee are the following:

(1) "Consultant Reform and Disclosure Act of 1981" is a misnomer. Since the definition of contract makes reference to "goods and services," the bill should be renamed the "Federal Procurement Regulatory and Disclosure Act of 1981." If the purpose of the bill is to address simply the alleged abuses in the use of consultants by the federal government -- as implied in the present title -- then the definition of "contract" needs to be modified accordingly. Conversely, if the intent is to include both consulting and contracting practices, the bill should be renamed. Also, if this is intended to be an omnibus procurement bill, the abuses on the government side need to be addressed as well.

(2) The bill's "sunshine in government" provisions will add a layer of regulation and bureaucracy on the federal procurement process. Also, the bill will generate an enormous paperwork burden for all procurement agencies. This would be antithetical to the current trend in Congress toward less regulation.

More significantly, this bill ignores the years of hard work that have gone into the "New Federal Procurement System," passage of P.L. 95-507, the Federal Acquisition Act, the Paperwork Reduction Act (P.L. 96-511), revision of OMB Circular A-76, promulgation of Federal Acquisition Regulations (FAR), and DoD's work on organizational conflicts of interests. S. 719 has the potential of overlapping, duplicating, and contradicting the above measures -- at a time when the Bush Task Force on Regulatory Relief and Congress are taking affirmative steps to eliminate this regulatory morass.

(3) Section 205 relating to "organizational conflicts of interest" concerns us as well. First of all, as noted above, DoD, at the request of OMB, already is in the process of writing organizational conflict of interest regulations.

Secondly, we think it is ill-advised to legislate organizational conflicts of interest, or good management practices.

Finally, rather than placing the burden on industry to provide all relevant information which relates to an existing or potential conflict of interest, the burden should be placed on the government agency to ask for the necessary information and then to make a determination whether a conflict of interest exists.

(4) The "budget identification and justification" section -- Section 206 -- creates an unworkable, inflexible, artificial process. Agencies, because of unforeseen circumstances and emergencies, cannot budget with any precision the amount to allot to a particular activity. In fact, it would make it impossible for OMB to deal with this inflexibility.

Secondly, earmarking procurement funds would cause at least a one year delay in all contract conversions to private performance under revised OMB Circular A-76.

Finally, line item budgeting creates a major problem for certain agencies, such as NASA, which are unable to reprogram money from one function to another.

(5) A comment must be made relative to the "contract evaluation" section, Section 204. While we share the commitment to ensure accountability within the procurement process, we support extending the accountability across-the-board, having it apply to government contracting officers as well. Under Section 204, an agency is responsible for preparing a written evaluation of contract performance. But, a provision should be added to require an evaluation of the in-house government contracting officer's performance.

Moreover, since an unfavorable report can adversely impact on a contractor's reputation and his ability to do future business with the government or with his private customers, we feel a right of appeal must be provided.

Contracting Out: More Cost-Effective

To contend that government usually can do any given job more efficiently and effectively than private industry simply belies reality and shows a lack of appreciation for the tangible benefits of free competition. Independent study after study clearly shows the real savings that can result from contracting out. Cities all across the country are saving taxpayers millions of dollars by contracting out for such services as fire protection, garbage collection, and even limited police work. A few years ago, Rand Corporation did a study which concluded that DoD alone could save $1 billion a year by using private firms to perform work that was being done by 250,000 civil service employees. Scores of competitions between government and industry document the cost-effectiveness of contracting out.

In 1980, a national task force of small businessmen issued a report to the Small Business Administration (SBA) entitled "Government Competition: A Threat to Small Business." This group found that taxpayers would have saved $2.98 billion in 1977 if 85% of the government's in-house business activities were opened to private enterprise. According to this report, the nation's small firms would have gained more than $2 billion worth of business annually if the federal government had produced less of its own goods and services and bought more in the market place.

And, a recent General Accounting Office (GAO) study reported that, when the federal government does its own housecleaning, the cost is about 50% more than when private contractors do the same work for the government.

We fear that some members of Congress have lost sight of the principles that made this country great. The market system is being threatened by support for continued government performance in areas where the private sector would provide greater efficiency. When private enterprise is attacked as a "parasitic network of contractors," as some members of Congress have done, we have reason to be concerned.

We urge your support in eliminating the current trend of taking billions of dollars worth of work away from businesses, large and small -- those who pay a large share of America's taxes -- and of giving that work instead to federal employees -- whose salaries and facilities are paid for with those tax dollars.

We appreciate your consideration of our views. We respectfully request that this statement be included in the record of your hearings.

○